REPORT OF THE ATTORNEY GENERAL'S ADVISORY COMMITTEE ON CLASS ACTION REFORM

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Ontario

Ministry of the Attorney General
Ministère du Procureur général

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February, 1990

The Honourable Ian Scott
Attorney General for Ontario

Dear Mr. Attorney:

Your Advisory Committee on Class Action Reform has the honour to submit its Report.

Yours truly,

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Chairman

Mr. Robert D. Anderson

Ms. Judith Andrew

Mr. Edward P. Belobaba

Ms. Helene Gagné

Mr. Rick Lindgren

Mr. Terrence O'Sullivan

Mr. David Poch

Mr. Andrew Roman

Mr. Norman J. Stewart

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REPORT OF THE ATTORNEY GENERAL'S ADVISORY COMMITTEE ON CLASS ACTION REFORM

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REPORT OF THE ATTORNEY GENERAL'S ADVISORY COMMITTEE ON CLASS ACTION REFORM

CHAPTER 1

Introduction

On Thursday June 29, 1989, Ontario Attorney General Ian Scott announced in the Legislature the Government's intention to bring forward legislation to make class actions more readily available in Ontario. An important part of this announcement concerned the formation of the Attorney General's Advisory Committee on Class Action Reform. This Committee's membership was comprised of a broad cross-section of those groups most interested in class action reform. Its mandate was to develop, within some specific parameters, the legal infrastructure of a meaningful class action procedure.

The Advisory Committee met from July, 1989 to January, 1990 and developed the Draft Act Respecting Class Proceedings and annotations set out in Chapter 4 of the this Report. The Committee was unanimous in making its recommendations.

The following individuals were members of the Advisory Committee:

Mr. Andrew J. Roman (representing the Canadian Bar Association - Ontario)

Called to the Ontario Bar in 1973, Mr. Roman has represented and advised a wide variety of public interest groups, corporations and government departments and agencies. He has taught law as a sessional lecturer at four law schools, lectures frequently at continuing education sessions and is the author of 30 publications, including two books. He is active in the Canadian Bar Association, and a member of the Executive of the National Administrative and Environmental Law Sections. Mr. Roman currently practices law with the firm of Miller Thomson.

Ms. Hélene Lamontagne-Gagné (representing the Insurance Bureau of Canada)

Ms. Gagne is a member of the Quebec Law Society and the Canadian Bar Association. She has worked in corporate and administrative law and litigation with the firm of Kierans & Guay, Montreal, as well as with Consumer and Corporate Affairs Canada as an administrator and counsel in legislation dealing with consumer protection, food inspection and Combines Investigation. Ms. Gagne is currently Senior Counsel with the Insurance Bureau of Canada, Toronto.

Mr. Edward P. Belobaba (representing the Consumers' Association of Canada)

Edward Belobaba is a partner with Gowling, Strathy & Henderson, Toronto, and specializes in civil and constitutional litigation. He has acted as a legal consultant to Federal and Provincial Governments in consumer protection and other law reform areas. He was called to the Bar in 1977 and is a member of the Advocates Society, the Canadian Civil Liberties Association, and the Canadian, American and International Bar Associations. Mr. Belobaba is a former Professor of Law and Associate Dean at Osgoode Hall Law School and is presently Editor in Chief of the Supreme Court Law Review.

Mr. David I. Poch (representing Energy Probe)

David Poch has worked as an environmental lawyer and researcher since 1980. He has been engaged in public interest litigation in both the regulatory and court setting. Mr. Poch currently represents Energy Probe, the City of Toronto and twelve other applicants in a Charter and Constitutional challenge to the federal Nuclear Liability Act.

Ms. Judith Andrew (representing the Canadian Federation of Independent Business)

Judith Andrew joined the Canadian Federation of Independent Business in 1982 as Assistant Director of Research. With academic and career experience in business administration, she contributed significantly to the effectiveness of the Federation's research department. After promotion and service as Associate Director of Research, Ms. Andrew was appointed Director of Provincial Affairs, Ontario, handling legislative action on behalf of the Federation's Ontario member firms. In 1989, Ms. Andrew was appointed as the Federation's Director of Provincial Policy.

Mr. Richard Lindgren (representing the Canadian Environmental Law Association)

Richard Lindgren has been a staff lawyer with the Canadian Environmental Law Association since his call to the bar. At CELA his case work has involved civil, criminal and administrative law, and his law reform activities have focused on numerous environmental issues, including hazardous wastes, resource management, intervenor funding and costs.

Mr. Terrence J. O'Sullivan (representing the Advocates' Society)

Called to the Ontario Bar in 1973, Mr. O'Sullivan has restricted his practice to litigation. He is a member of the Canadian Bar Association, Canadian Civil Liberties Association, Advocates' Society of Ontario (Vice-President and Director) and the American Trial Lawyers Association. Mr. O'Sullivan is a partner with McMillan, Binch practising commercial, product liability, and administrative litigation.

Mr. Peter Woolford (representing the Retail Council of Canada)

Peter Woolford is Vice-President, Policy of the Retail Council of Canada. He is responsible for representing the interests of retail merchants on a wide range of federal and provincial issues. Prior to joining Retail Council in 1988, he held various positions with the Federal Government, in the Department of Finance, the Department of Industry Trade & Commerce, the Ministry of State for Economic Development and the Ontario Federal Co-ordinator's Office.

Mr. Norman J. Stewart (representing the Canadian Manufacturer's Association)

Called to the Ontario Bar in 1976, Mr. Stewart practised in the areas of general civil, matrimonial and criminal litigation before becoming Assistant Counsel with General Motors of Canada. He also served as Director of Government Relations and Assistant General Counsel of General Motors of Canada. Mr. Stewart is a participant in the Canadian Manufacturers' Association, the Motor Vehicle Manufacturers' Association and both the Ontario and the Canadian Chamber of Commerce. Mr. Stewart presently is General Counsel and Secretary of the Ford Motor Company of Canada Limited.

Mr. Robert D. Anderson (representing the Ontario Chamber of Commerce)

Called to the Bar in 1960, Mr. Anderson has been counsel with Procter and Gamble Inc. since 1963. In addition to being a director of the Ontario Chamber of Commerce, he has been actively involved with a number of other organizations, including the Association of Canadian General Counsel (President 1988-89), the Canadian Manufacturers' Association, and the Children's Aid Society of Metropolitan Toronto. Mr. Anderson is currently General Counsel and Secretary of Procter and Gamble Inc.

Mr. Michael G. Cochrane

Called to the Ontario Bar in 1980, Mr. Cochrane has been Counsel in the Policy Development Division of the Ministry of the Attorney General since 1985. Prior to joining the Ministry he was in private practice and specialized in civil litigation. He is the author of a text on family law in Ontario and has been an instructor in civil procedure with the Law Society of Upper Canada Bar Admission Course for seven years.

It should be noted that each of the above representatives served without remuneration and enthusiastically prepared for and attended numerous meetings. The quality and precision of their recommendations is solid testimony to the knowledge and devotion each member brought to the Advisory Committee.

I also wish to acknowledge on behalf of the Committee the work of Mr. Daniel Jazvac who, during the course of the Committee's work, acted as Secretary to the Committee while continuing his studies as a third year law student. In addition, Mr. Shawn Scromeda, an articling student with the Policy Development Division of the Ministry of the Attorney General, provided some much needed research and technical assistance.

Michael G. Cochrane
Chairman

REPORT OF THE ATTORNEY GENERAL'S ADVISORY COMMITTEE ON CLASS ACTION REFORM

CHAPTER 2

Executive Summary

The Attorney General's Advisory Committee on Class Action Reform was formed in June of 1989 to bring together representatives of major interest groups to consult with government and each other about the best method of class action reform for Ontario. In undertaking to serve on the Attorney General's Committee the representatives of the various groups agreed that the reform should be designed within the following parameters:

- any procedure developed should treat plaintiffs and defendants in a fair and equitable manner and should not impose any unnecessary burdens on the courts,

- the procedure should have a certification component by which the court would screen potential class actions according to specific tests,

- the procedure would feature a rule that all class members who do not specifically opt-out of the class action procedure would be included in it,

- there would be a presumption that notice would be given to class members following certification, unless otherwise ordered by the court,

- there would be a controlled contingency fee,

- there would be no special role for the Attorney General in class actions, and finally,

- any undistributed monetary award made in a class action would be returned to the defendant following the expiry of relevant limitation periods, except in the case of environmental cases, which would be given further consideration by the Committee.

It was also an assumption that any new procedure developed by the Advisory Committee would be made available through statutory reform as opposed to changes to the Rules of Civil Procedure of the Supreme and District Court.

With a consensus around this starting point, the Advisory Committee set out to develop the detailed infrastructure of a class action procedure.

In designing this infrastructure the Committee recommends

unanimously as follows:

- the procedure should be known as a "class proceeding" rather than a "class action" in order to accommodate terminology changes in the Courts of Justice Act, 1984,

- the procedure would be available in the Supreme and District Courts and the Rules of Procedure for those courts would apply unless otherwise stated,

- the procedure should contemplate the creation of a class of plaintiffs by either the representative plaintiff or the defendant(s),

- in considering the certification of a proceeding the court should have regard to whether,
  - there is a cause of action,
  - there is an identifiable class of more than one person,
  - there are issues of fact, or issues of law arising from the facts that are common but not necessarily identical to the class,
  - a class proceeding would be the preferable procedure for resolution of the common issues,
  - the representative plaintiff would fairly and adequately represent the interests of the class,

has produced a plan for the proceeding and does not have, on the common issues, an interest in conflict with those of other members of the class,

- the court should not refuse to certify a proceeding as a class proceeding on the grounds that the relief claimed,
  - includes a claim for damages that would require individual assessment in subsequent proceedings involving the defendant,
  - arises out of or relates to separate contracts between members of the class and the defendants,
  - seeks different remedies for different members of the class or subclass,

- nor should the court refuse to certify a proceeding because the number or identity of every member of the class is unknown,

- any person who is a member of a class should be permitted to opt-out by a means and within a time established by the order of certification,

- if a proceeding no longer meets the standard necessary for a class proceeding then it may be decertified,

- in the class proceeding issues common to the class should be determined in common proceedings and issues that require the participation of individual members should be determined in individual proceedings,

- the court should have the power to permit interventions by class members to ensure fair and adequate representation of the class and to ensure the fair and expeditious determination of the proceeding,

- the court should order that notice of the proceeding be given to class members after certification and in doing so should consider the cost of giving notice, the nature of the relief sought, the size of the class and size of their individual claims among other things,

- the court should have the power to require notice to class members and the content of such notice throughout the proceeding, including any individual proceedings,

- with a few exceptions the ordinary rules of discovery of parties should apply to a class proceeding,

- where liability is not in issue the court should have the power to determine the aggregate amount of the defendant's liability without proof by individual

members of the class,

- the court should have the power to direct payment of judgments by lump sum, forthwith or in instalments and to stay execution if necessary,

- the procedure should set out what shall be specified in a judgment on issues common to the class,

- the procedure should provide the court with a variety of options for distributing the judgment to class members including direct distribution, payment into court or other depository, or distribution in a manner that may reasonably be expected to benefit members of the class by any means authorized by the court,

- the court should have the power to supervise all settlements, dismissals and discontinuances including the power to order that the class be given a written accounting of the conduct of the proceeding, the result and the planned distribution,

- there should be an appeal to the Divisional Court, and, in some cases, to the Court of Appeal,

- the normal rules with respect to costs should apply and

continue to be in the court's discretion,

- in exercising its discretion on costs the court should have regard to the fact that the issue in dispute was in the nature of a test case, raised a novel point of law or concerned a matter of public interest,

- contingency fee arrangements between a lawyer and representative plaintiff should be permitted,

- fees and disbursements agreements between lawyer and client should be in writing and should stipulate the arrangement,

- the possibility of a lawyer and client agreeing on a method of billing for legal fees that would entail a multiplier being applied to the normal legal fees in order to compensate a lawyer for undertaking the risk should be permitted,

- any agreement with respect to fees and disbursements should be subject to approval by the court and once approved should become a first charge on the settlement funds or monetary award,

- normal procedures with respect to offers to settle

should apply,

- special rules with respect to evidence should be provided to enable the use of statistical and sampling evidence in the proceedings,

- the same judge should hear all motions before the trial of the questions common to the class and another judge should preside at the trial,

- assistance through a "Costs Assistance Fund" should be provided to assist plaintiffs with disbursements, the costs of experts and such expenses as notice to the class. In addition the Fund should stand ready to indemnify a plaintiff for the defendant's costs if the action is unsuccessful,

- the precise structure of the Costs Assistance Fund and amount of an initial endowment necessary to meet its potential obligations should be determined with the assistance of persons knowledgable in the area of financial funding,

- quality legal education on the subject of class proceedings should be available for the public, the legal profession and the judiciary,

- the model recommended by this Committee should be taken forward by Ontario to the Uniform Law Conference of Canada for consideration, and

- the procedure, once implemented, should be monitored closely to ensure that it achieves its important objectives.

This executive summary sets out in general terms the most significant recommendations of the Advisory Committee. It is not exhaustive and reference should be made to the more detailed description of the procedure in the following Draft Act with Respect to Class Proceedings with Annotations.

As noted at the outset, despite the diversity of the views and interests represented at the discussions, the recommendations contained in this report are unanimous.

CHAPTER 3

Class Actions in Ontario: A Short History of Reform

A class action is an action brought on behalf of, or for the benefit of numerous persons having a common interest. It is a procedural mechanism that is intended to provide an efficient means to achieve redress for widespread harm or injury by allowing one or more persons to bring the action on behalf of the many.

Ontario's Rules of Civil Procedure currently contemplate plaintiffs and defendants being involved in class actions. Rule 12 provides as follows:

> "Where there are numerous persons having the same interest, one or more of them may bring or defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so."[1]

The rule has not been substantially altered since 1881, and, given its limited wording, the courts have, through their interpretation of it, identified both the substantive and the

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[1] Rule 12, Representative Proceedings, Rules of Civil Procedure, Ontario Regulation 560/84

procedural limitations of the class action rule.

Why Class Actions Are A Necessary Procedural Mechanism

It is an unavoidable fact that modern industrialized societies such as Ontario will suffer mass injuries. North Americans have already witnessed incidents of widespread harm from defective products such as thalidomide or the Dalkon IUD. So too have they seen mass environmental injury such as the incident at Three Mile Island or the recent PCB fire in Quebec. Mass injuries have also occurred through negligence or breach of contract in the case of airplane crashes, train derailments, defective products, illegal strikes and other such incidents that may harm or cause losses to hundreds if not thousands of people. No one wishes such mass injuries or losses to occur but they are inevitable. A class action, in which many similarly injured persons join together, can provide an effective and efficient means of litigating such mass claims.

However, this is not the only reason class actions are necessary procedural mechanisms. Ontarians also live in a society that strives to maximize access to justice for its citizens. Sophisticated and highly evolved rights and obligations are of little value if they cannot be asserted or enforced effectively and economically. Of what value is a right or obligation, or the judicial system itself, if its users must

be told that the right is "too small" or "too complex" or "too risky" to justify its enforcement?

A class action can provide the means by which such claims can be asserted and given access to justice. A meaningful procedure can achieve economies in the use of judicial and court resources and provide widespread redress to many individuals who have suffered a loss or injury. This is the case whether the class action is brought by the plaintiffs or the defendants.

Finally, the presence of effective remedies of any sort inevitably must contribute to a sharper sense of obligation to the public by those whose actions affect large numbers of people. This is the case whether the obligation is owed by an aircraft manufacturer, a pharmaceutical company, a financial institution or even a government. An effective class action procedure has the potential to contribute to improved compliance with such obligations.

In summary, the case for reform hinges on three general propositions:

(i) class actions may lead to more efficient judicial handling of potentially complex cases of mass wrong;

(ii) class actions may provide improved access to justice

for those whose actions might not otherwise be asserted, and;

(iii) class actions may inhibit misconduct by those who might be tempted to ignore their obligations to the public because claims by the injured were too small or too difficult to assert.

An Approach to Reform

Two linked approaches are necessary to accomplish the reform of class action procedures:

(i) the legal and economic obstacles to class actions must be reduced so that such proceedings are available, and;

(ii) safeguards must be provided to protect those involved, whether as representative plaintiff, as defendants or as class members.

These latter concerns arise from the fact that a class action is brought by an individual representative plaintiff on behalf of a group of absent class members. These absent plaintiffs are not necessarily present before the court and lack any real ability to determine the course of litigation which may affect their individual rights.

Similarly, a defendant facing a class action on behalf of hundreds, thousands or tens of thousands of claimants may need assurances that the claim is appropriately suited to the class action procedure and that its potential liability can be addressed through the one mass claim.

The legal obstacles to class actions in Ontario were enunciated in 1983 in the decision of the Supreme Court of Canada in General Motors of Canada Ltd. v. Naken.[2] This case involved claims being advanced on behalf of thousands of purchasers of General Motors' 1971/1972 Firenzas. Each member of the class of Firenza owners claimed $1000.00 in damages as compensation for the significant faults in these vehicles. The claim was based on breach of a collateral warranty and resulting loss of resale value.

The Supreme Court's language was unequivocal in stating that the wording of the representative proceeding rule (then rule 75, now Rule 12) was wholly inadequate to support such potentially complex litigation. Legislative reform was needed, the court said, if meaningful class actions were to be available.

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[2] (1983), 32 C.P.C. 138 (S.C.C.)

In advance of the Supreme Court of Canada's decision, the Ontario Law Reform Commission undertook a study of class actions. Its report is widely acknowledged as the most sophisticated and extensive analysis of class actions undertaken in the world. The Report on Class Actions[3] released in 1982, became the focal point of the class action debate between 1982 and 1988. However, it did not produce any legislative initiatives in Ontario or other Canadian provinces.

In 1988 a number of events in Ontario combined to move class action reform from the level of discussion to more concrete action. The first was the Attorney General of Ontario's hosting of a Conference on Access to Civil Justice in June of 1988. During the conference a panel discussion on group claims and collective rights produced a recommendation that class action reform be undertaken to lower procedural barriers to their use.

A second event was the reactivation of the class action issue on the agenda of the Uniform Law Conference of Canada at its annual meeting in Toronto in August of 1988. An Ontario discussion paper entitled "Class Actions: A Path To Reform"[4] was tabled for discussion. After a very thorough debate the

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[3] Report on Class Actions, Ontario Law Reform Commission, 1983, Vol. I - III.

[4] Proceedings of the Uniform Law Conference, Seventieth Annual Meeting, p.49.

Conference recommended that a draft Uniform Act be prepared for consideration in August of 1989.

Immediately after the Uniform Law Conference meeting in Toronto, the issue of class action reform was again raised when Attorney General Ian Scott held consultations with interested groups in Ontario concerning the issues considered by the Uniform Law Conference. After several months of consultation with major interest groups an agreement was reached to undertake class action reform in Ontario on the following basis:

* The Government of Ontario would announce its decision to bring forward legislation to make class actions available in Ontario;

* The Ministry of the Attorney General would establish a formal class action consultation process with representatives of government, lawyers, business and consumers to be known as the Attorney General's Advisory Committee on Class Actions (hereinafter referred to as "the Committee"). The participants in the consultation would be: the Canadian Federation of Independent Business, the Canadian Manufacturers' Association, the Retail Council of Canada, the Ontario Chamber of Commerce, the Consumers' Association of Canada, the Canadian Environmental Law Association, the

Advocates' Society, the Canadian Bar Association (Ontario), Energy Probe and the Insurance Bureau of Canada.

* The consultations would start from the premise that the class action procedure would treat plaintiffs and defendants in a fair and equitable manner and would impose no unnecessary burdens on the courts.

* The procedure would include a structured certification of the proceeding by the court in which a judge would screen potential class actions according to specific tests.

* The procedure would also feature a rule that all class members who do not specifically opt-out of the class action would be included in it.

* There would be a presumption that notice would be given to class members following certification, unless otherwise ordered by the court.

* There would be a controlled contingency fee arrangement.

* There would be no special role for the Attorney General

of Ontario in class actions.

* Any undistributed awards made in a class action would be returned to the defendant following the expiry of relevant limitation periods, except with respect to environmental cases, which would be given further consideration by the Advisory Committee.

As a part of the announcement, Attorney General Ian Scott noted that the Government intends the new class action procedure to apply in all types of claims, and that it would involve balanced court rules and procedures. In particular, the class action procedure developed would be applicable in environmental litigation and in consumer litigation. The Ministries of the Environment and Consumer and Commercial Relations, which have been considering other forms of class action, would contribute their expertise but agreed to leave the creation of a class action procedure to the Attorney General's consultation process while its work was ongoing.

In August of 1989 at its meeting in Yellowknife N.W.T., the Uniform Law Conference agreed to postpone its consideration of the class action issue until the Attorney General of Ontario's Advisory Committee had completed its work.

CHAPTER 4

The Committee's Recommendations: An Annotated Draft Act Respecting Class Proceedings

Introduction

The Committee's recommendations are set out in the provisions of the following Draft Act and the specific annotations on each section. The Committee adopted this course to be able to provide a clear description of the desired procedure and to be able to provide the Attorney General and legislative counsel with specific guidance on the drafting of a Bill.

The Means of Reform: Act or Rule Change?

Jurisdictions vary in the means by which class actions were introduced to their legal system. Some have relied on changes to the Rules of Civil Procedure, while others have introduced statutory change. In establishing the Advisory Committee's mandate the Attorney General indicated a preference for statutory change for a number of reasons. The procedure represents a significant development in the administration of justice in Ontario. It has been the subject of controversy and debate. The

recommended reforms call for the removal of substantive obstacles to class proceedings. Such obstacles can only be removed by the Legislature.

The Rules Committee of the Supreme and District Court (to be known as the Civil Rules Committee once Bill 2, the Courts of Justice Amendment Act (Court Reform) is proclaimed) is comprised of representatives of the bench and bar appointed by the Attorney General pursuant to the Courts of Justice Act, 1984. The Rules Committee, while accountable to the Attorney General, has the freedom to alter or modify the Rules of Court from time to time as it sees fit. Reforms such as those recommended herein, are of such significance to the administration of justice that they warrant consideration by the Legislature of Ontario and should only be subject to change by the Legislature.

The new procedure requires a specificity and, in some cases, a priority over other litigation which the Rules of Civil Procedure are unaccustomed and inappropriate in providing.

The Committee accepts these considerations and has therefore designed its recommendations for the reform of class proceedings in the form of a "Class Proceedings Act" rather than through recommendations for amendments to the Rules of Civil Procedure of the Supreme and District Court.

The Annotated Draft Class Proceedings Act

The Advisory Committee on Class Action Reform makes the following unanimous recommendations with respect to reform:

A Draft Act Respecting Class Proceedings, with Annotations

"HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

INTERPRETATION

1. In this Act,

(a) "certify" means to permit a proceeding to be maintained as a class proceeding, but does not mean to approve the merits of the proceeding;

(b) "class proceeding" means a civil proceeding certified as a class proceeding by an order made under this Act, and includes a proceeding commenced by (i) statement of claim, (ii) notice of proceeding, or (iii) notice of application;

(c) "common issue" means an issue of fact, or issue of law arising from the facts that is common but not necessarily identical to the class;

(d) "court" means the Supreme Court or District Court;

(e) "discovery", unless otherwise provided by this Act means discovery as provided by the Rules of Civil Procedure.

Discussion

The committee considered the possibility of class proceedings before the Small Claims Court and concluded that the Small Claims Court procedure was not sophisticated enough or complete enough to support meaningful class proceeding activity. For this reason, class proceedings are confined to the Supreme and District Court.

- There was a consensus that it would be convenient to have one class proceeding procedure for all forms of class proceeding activity, including derivative rights and, for example, the interests of condominium owners. It was agreed that the recommendations of the Committee would be confined to the development of a generic class proceeding procedure and that consideration should be given at a later date to try to bring all forms of class proceeding under one type of proceeding.

- Court reform initiatives in Ontario may alter the interpretation of "court". Both the Supreme Court and District Court should have jurisdiction over class proceedings, with the total amount of the claims asserted on behalf of the class, rather than the amount of the individual claims, determining the question of monetary jurisdiction (as recommended by the Ontario Law Reform Commission [hereinafter referred to as the O.L.R.C.] at p.464, Class Action Report. All references to the Ontario Law Reform Commission in this report are to the Commission's 1982 Report on Class Actions.)

PLAINTIFF'S CLASS PROCEEDING

2. - (1) One or more members of a class of persons may commence a proceeding on his or her own behalf and on behalf of the members of the class.

(2) A person who commences a proceeding under subsection (1) shall be known as the representative plaintiff.

(3) Unless otherwise provided, the Rules of Civil Procedure for the Supreme and District Court shall apply to proceedings commenced pursuant to this Act.

Discussion

- Res judicata is a legal principle meaning that a final judgment rendered by a court on the merits of an issue is conclusive as to the rights of the parties and constitutes an absolute bar to subsequent action involving the same claim or cause of action.

- The wording of s.2(1) is needed to avoid the application of res judicata and underlines that the plaintiff is bringing a proceeding on his or her own behalf and potentially on behalf of others in the class. Should the court decide that this plaintiff meets section 3(4) and fairly and adequately represents the others in the class, the class proceeding can be

maintained. If the court, for whatever reason, decides that a class proceeding is not appropriate, the dismissal of the case as a class proceeding does not and should not affect the ability of other members of the class to maintain individual claims. The refusal to certify will result in the individual's claim being asserted only as a normal lawsuit.

- The O.L.R.C. recommended that "person", within the meaning of ss.(1), specifically include a corporation. The Committee considered this point and noted that s.30, Paragraph 28, of the Interpretation Act (Ontario) defines "person" to include "a corporation and the heirs, executors, administrators, or other legal representatives of a person to whom the context can apply according to law." It is therefore unnecessary to make a reference to the fact that person includes a corporation.

- With respect to concerns about shell corporations acting as plaintiffs the Committee notes the conclusions of the Supreme Court of Canada in L'Association des Propree des Jardins Taché v. Daskin Enterprises.

DEFENDANT'S CLASS PROCEEDING

3.- (1) A defendant to more than one proceeding that involves issues of fact or law arising from facts that are common, but not necessarily identical may, at any stage of a proceeding move under this Act to have the proceeding certified as a class proceeding and for an order appointing a member of the class as the representative plaintiff.

(2) At any stage of a proceeding any party may move for an order requesting named defendants to defend the proceeding as a class and for an order appointing a defendant as the representative defendant.

(3) An order appointing a member of the class as the representative plaintiff or defendant shall only be made with the consent of the person upon such terms as the court considers appropriate.

(4) On a motion pursuant to ss.(1) or (2) or with respect to a resulting order the provisions of this Act with respect to certification apply mutatis mutandis.

Discussion

- The Committee anticipates the need for defendant class proceedings and developed this provision to ensure that

such proceedings were available and mirrored plaintiff class proceedings.

CERTIFICATION

4. - (1) After the commencement of a proceeding under section 2, the representative plaintiff shall move for an order from the court certifying the proceeding as a class proceeding.

(2) A defendant may deliver a Statement of Defence but shall deliver a Notice of Intent to Defend in accordance with the Rules of Civil Procedure prior to the hearing of the certification motion.

(3) A motion under subsection (1) shall be brought within 90 days from the day upon which the defendant filed a Statement of Defence or Notice of Intent to Defend.

(4) The court shall certify the proceeding as a class proceeding if the court finds that,

(a) there is a cause of action;

(b) there is an identifiable class of more than one person;

(c) there are issues of fact, or issues of law arising from the facts that are common but not necessarily identical to the class;

(d) a class proceeding would be a preferable procedure for resolution of the common issues; and

(e) the representative plaintiff would fairly and adequately represent the interests of the class, has produced a plan for the proceeding and does not have on the common issues an interest in conflict with those of other members of the class.

(5) The representative plaintiff and defendant shall provide their best information as to the size of the class of claimants.

(6) The onus of establishing that a proceeding should be certified as a class proceeding is upon the person so contending.

(7) For the purposes of subparagraph 4(4)(e) the "plan" shall set out a demonstrable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding.

(8) On the motion for certification the court may adjourn the matter to permit the parties to amend their materials or their pleadings or to adduce further evidence.

Discussion

- While the O.L.R.C. did not recommend that the motion for certification be compulsory, given the Committee's mandate, the Committee felt that the application for certification should be mandatory.

- The motion for certification will be like other motions before the court and will rely primarily on affidavit evidence. Although it would be possible for other forms of evidence to be placed before the court, no specific comment is needed at this time with respect to evidence.

- Both the plaintiff and the defendant should be able to file affidavit material on the motion for certification. The Committee specifically considered the Quebec rule whereby only the plaintiff is permitted to file affidavit material. Given the absence of a preliminary merits test in the proposed certification procedure, the volume of affidavit material would likely be less under our proposed model.

- It is the Committee's opinion that evidence on the motion for certification should be confined to the criteria set out in ss.(4).

- The Committee favoured a one-step certification procedure that would give the court the power to order certification, dismiss the motion, or adjourn for further and better evidence concerning the criteria that must be met for certification. This type of procedure contemplates the court being able to adjourn subject to such further and other directions as may be given.

- It was agreed that the certification motion should not be a forced choice between certification or no certification. The court should have the specific power to send the parties away to come back before the court at a later date with further and better information, a revised plan, or amended proceedings.

- The Committee, in ss.4(d), selected the word "preferable" over other words such as "reasonable" or "superior", as it was thought that the word "preferable" would best draw the court into a consideration of whether or not the class proceeding was a fair, efficient and manageable method of advancing the claim. The class proceeding should also be preferable in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on.

- The Committee endorses the conclusions reached by the O.L.R.C. at p.465 of its Class Action Report as follows:

  - the proposed Act should contain no express provisions respecting third party claims, cross-claims, consolidations or co-ordination of related claims.

  - the Rules of Civil Procedure and the Courts of Justice Act, 1984 (as it is now called) as amended should apply as in other litigation.

- Section 4(4)(b) should be read in the context of section 5. It should be noted that in the case of aggregate awards or claims for injunctive or declaratory relief the individual members of the class and their exact number may be undeterminable. In such cases they need not be identifiable on an individual basis.

- The Committee recommends that the Law Society of Upper Canada consider changes to the Rules of Professional Conduct to resolve potential conflicts between the lawyer's respective obligations to the representative plaintiff and members of the class. Consideration of a special written retainer may be necessary.

REMOVAL OF SUBSTANTIVE BARRIERS

5. - The court shall not refuse to certify a proceeding as a class proceeding on the ground only that the relief claimed,

(a) includes a claim for damages that would require individual assessment in subsequent proceedings involving the defendant, or

(b) arises out of or relates to separate contracts between members of the class and the defendant(s),

(c) seeks different remedies for different members of the class or subclass,

or that the number of members or identity of every member of the class is unknown.

Discussion

- With respect to (c), some plaintiffs may claim damages while others may claim specific performance. This should not preclude certification.

- Sub-classing is a process by which the larger class is divided into more distinct and representative groups. A sub-class will have an issue of law or fact common to itself and therefore requires separate representation in order to protect interests that it has separate from the larger class. Inherent in sub-classing is the need to ensure that the sub-class is not prejudiced by being in conflict with the larger classes' interests.

EVIDENCE AT CERTIFICATION

6. - Upon a motion for certification under section 4, the representative plaintiff shall and the defendant may serve and file one or more affidavits setting forth the material facts upon which each intends to rely.

Discussion

- While the motion for certification would in most respects follow the normal procedure, this section requires the representative plaintiff to file affidavit material with the court. There is no corresponding obligation on the defendant.

- The Committee notes that there would be an entitlement to cross-examine on the affidavits filed.

OPT-OUT ENTITLEMENT

7. - Any person who is a member of a class on whose behalf a proceeding has been certified may opt-out of the proceeding in the manner prescribed by the order of certification.

Discussion

- This provision sets out a class member's entitlement to withdraw from the class proceeding and, if desired, start an individual proceeding.

- The provision was a part of the Committee's mandate as described in its terms of reference.

- Once a class proceeding is commenced members of the class are presumed to be in the proceeding unless they take concrete steps to "opt-out".

- The value of such a model is that defendants to class proceedings are assured that they face all potential claimants in one law suit. Those who opt-out can be specifically identified and dealt with on that basis. The opt-out model also increases the effectiveness of a class proceeding by not requiring potential litigants to take steps to be in the suit. This is particularly so in cases involving individual claims that are relatively small.

ORDER FOR CERTIFICATION

8. - (1) An order certifying a proceeding as a class proceeding shall describe:

(a) the class on whose behalf the proceeding is brought;

(b) the nature of the claim(s) made on behalf of the members of the class and specify the relief claimed;

(c) define the issues of fact or issues of law arising therefrom common to the class; and

(d) the manner in which members of the class will be permitted to exclude themselves from the class proceeding and specify a point after which members of the class may not exclude themselves.

(2) The court may at any time upon the motion of the representative plaintiff or defendant amend an order certifying a proceeding as a class proceeding.

(3) In the case of an order certifying a proceeding as a class proceeding the court may make such similar orders as are needed with respect to sub-classes at any time in the proceeding.

Discussion

- Section 8(1)(d) provides that the court may specify a "cutoff" date for opting-out. The Committee believes

that those who wish to launch individual proceedings or simply not be in a lawsuit should be given a reasonable opportunity to opt-out. However, once a certain point in the litigation has passed, those who are class members must stay involved with the claim. "Fence sitting" undermines the action, is unfair to the defendant and can be prevented by a fixed cutoff date.

DECERTIFICATION OR AMENDMENT

9. - (1) Upon the motion of a party or member of the class, where it appears to the court that the conditions in subsection 4(4) are no longer satisfied, the court may amend the order under s.4(4), and may decertify the proceeding or may make any other order it considers appropriate.

(2) Where the court makes an amending order pursuant to subsection (1) it may make amendments to the proceedings to eliminate any reference to the representation of members of the class, and the proceeding may proceed accordingly.

(3) Where, upon a motion pursuant to subsection (1) for decertification of the proceeding, the court is satisfied that the proceeding satisfies subsection 4(4) in all respects except with respect to adequacy of representation by the plaintiff, the court may make an order substituting another member of the class as the representative plaintiff.

Discussion

- The class must meet certain standards in order to qualify as a class proceeding and be certified. It may be that some proceedings will fall below the standard after certification. For example, the representative plaintiff may discover that the class is not as numerous as first thought and that another procedure would be a preferable method of advancing the claim. In such circumstances the proceeding could be decertified and could then proceed as an individual claim or claims.

- If the only difficulty is the ability of the particular representative plaintiff to represent the class, then a new representative should be appointed without the loss of certification.

AMENDMENT OF PLEADINGS

10. - Where the court refuses to certify a proceeding as a class proceeding or makes an order under section 9, the court may order that the pleadings be amended to eliminate any reference to the representation of members of the class or make such other

order as the court considers appropriate.

Discussion

- It will be necessary for the representative plaintiff to frame the proceeding as being on behalf of the class in advance of or in anticipation of the motion for certification. In the event the motion is unsuccessful the court should have the power to immediately convert the proceeding into a normal proceeding with reference to any representation. This will preserve the plaintiff's individual claim and avoid any need to recommence a fresh proceeding.

- Similarly, if at a later date the court determines that what was once a proper class proceeding is no longer proper, then the court should have the power to amend the pleadings so as to describe only the plaintiff's individual claim or claims as the case may be.

COMMON AND INDIVIDUAL ISSUES

11. - (1) In a class proceeding, issues that are common to the class shall be determined in common proceedings, and issues that require the participation of individual members of the class shall be determined in individual proceedings under section 21.

(2) Where there are common proceedings and individual proceedings, the court may give separate judgments in respect of each.

Discussion

- It is a common feature of class proceedings that a bifurcation occurs in the proceedings. Common questions related to liability are determined first, followed by individual proceedings on the question of damages.

INTERVENTION

12. - In order to ensure the fair and adequate representation of the interests of the class or for any other appropriate reason, the court, at any time in a proceeding under this Act, may permit one or more members of the class to intervene upon such terms and conditions, including costs, as the court considers proper.

Discussion

- This provision is designed to ensure protection of the class and in particular absent class members. Any

member of the class may ask for leave to intervene at any time.

POWERS OF COURT

13. - (1) The court, upon the motion of a party or member of the class, may make any order determining the course of the proceeding for the purpose of ensuring the fair and expeditious determination thereof, and the court may impose such terms and conditions upon the parties as it considers proper.

(2) The court, on its own initiative or on motion by any party or member of the class, may stay any proceeding related to the class proceeding before the court, on such terms as are considered just.

Discussion

- This section describes the general power of the Court to control its own process and to develop procedures as needed from case to case.

- It is also designed to enable the parties or members of the class to come forward with their views on how the proceeding is being managed.

NOTICE

14. - (1) After the court certifies a proceeding as a class proceeding, notice shall be given by the representative plaintiff to members of the class informing them of the class proceeding, unless the court orders otherwise.

(2) In deciding whether to order notice under subsection (1) and the means by which notice shall be given under this section, the court shall consider,

(a) the cost of giving notice,

(b) the nature of the relief sought,

(c) the size of the individual claims of the members of the class,

(d) the size of the class,

(e) the place of residence of members of the class,

(f) any other relevant matter.

(3) Where the court orders notice under this section, notice may by given personally or by mail to individual class members, by advertisement, publication, posting or distribution or any other means considered appropriate, unless the court, having regard to the matters set out in subsection (2), orders notice by some other method, including individual notice to a sample portion of the class.

(4) The court may order notice to be given in different ways or a combination of ways to various members of the class.

(5) Unless otherwise ordered by the court, notice under this section shall include:

(a) a general description of the proceeding, including the relief sought, and the names and addresses of the representative parties;
(b) a statement of the right of members of the class to exclude themselves from the proceeding in the manner specified, by a certain date;
(c) a description of possible financial consequences to the class;
(d) a description of the fees and disbursements arrangement between the representative plaintiff and the class lawyer;
(e) a general description of any counterclaim being asserted by or against the class, including the relief sought;
(f) a statement that the judgment, whether favourable or not, will bind all members of the class who do not exclude themselves from the proceeding;
(g) a statement that any member of the class may intervene either personally or through counsel;
(h) an address to which inquiries may be directed; and,
(j) any other information the court considers appropriate.

(6) When requested by the representative plaintiff notice under this section may include a solicitation of individual contributions from class members to assist in underwriting the fees and disbursements incurred.

Discussion

- A multi-language notice may be needed in some cases.

- The Rules Committee may wish to develop as a part of the Rules of Civil Procedure forms of notice suited to Ontario.

- The Committee wishes to note the intention that notice to the class should be presumed unless the court orders otherwise.

- Mass injury does not always honour provincial or national borders. Where potential class members or defendants reside out of province methods will need to be devised to accommodate the resulting logistical problems. Sub-classing of class members, for example, may address the problem in part. Uniform class procedures in all Canadian provinces would minimize concern over such occurrences. If all injured persons had access to such a procedure then uniformity of access to justice would occur regardless of how or where the mass loss occurred.

- The Committee notes the general uniformity between its recommendations and the existing Quebec class action procedure.

- In subsection (5) the Committee recommends a presumption that such matters be dealt with in the notice unless, for good reason, the court orders otherwise.

NOTICE IN INDIVIDUAL PROCEEDINGS

15. - (1) Where the court gives judgment for the class on the questions common to the class and orders that individual proceedings under section 21 are necessary, the court shall order that notice of the judgment be given to the members of the class whose participation in such individual proceedings is required.

(2) Unless the court orders otherwise, notice under this section may be given personally or by mail to members of the class who are identifiable through reasonable means in terms of expense and effort, and by advertisement, publication, posting or distribution to members of the class who are not so identifiable.

(3) Such notice shall include,

(a) a statement informing the members of the class that a judgment on the questions common to the class has been given and that they may be entitled to relief thereunder;

(b) a statement informing the members of the class of the steps necessary to establish their claims;

(c) a warning that, upon failure to take such steps, the member will not be entitled to relief except by leave of the court;

(d) the name and address of the representative plaintiff to which further inquiries may be directed; and

(e) any other information that the court considers proper.

Discussion

This provision will enable the court to order additional and more specific notice to individual class members once the common issues have been determined.

GENERAL NOTICE

16. - (1) At any time in a proceeding under this Act, the court may order such notice as it considers necessary to protect the interests of the members of the class and the parties or otherwise for the fair conduct of the proceeding.

(2) In deciding whether to order notice under this section, the court shall consider:

(a) the cost of giving notice;

(b) the nature of the relief sought;

(c) the size of the claims of the members of the class;

(d) the total amount of monetary relief claimed in the proceeding; and

(e) any other matter the court considers relevant.

(3) Where the court orders notice under this section, notice shall be given by advertisement, publication, posting, mail, or distribution, unless the court, having regard to the matters set out in subsection (2), orders notice by some other method, including individual notice to a sample portion of the class.

(4) The court may order notice to be given in different ways or a combination of ways to various members of the class.

(5) The court may determine by whom and to what extent the cost of notice ordered under this section shall be paid and may apportion the cost between the parties or sub-classes.

17. - Notice under section 14, 15 or 16 shall not be given unless the court approves its contents.

18. - The court may order the defendant to deliver, by whatever means are available to it, the plaintiff's notice under sections 14, 15 or 16, where to do so would be more practical.

Discussion

- The primary obligation for the delivery of notice is the plaintiff's.

- Section 18 is designed to enable the court to order a defendant to use means at its disposal to assist in delivery of the plaintiff's notice. For example, in cases of utilities it may be easier for the utility to include notice with its billings. This would be less expensive and would draw the proceeding to the attention of those most directly affected.

- The defendant's role in delivery of notice would only be by court order.

- Delivery should not be equated with paying for the notice. In some cases the defendant may charge the representative plaintiff a reasonable fee for the service, which would be reimbursed to the defendant regardless of the outcome unless the court ordered otherwise.

DISCOVERY

19. - In a class proceeding,

(a) the representative plaintiff and the defendant have the same rights of discovery against each other as are available in ordinary proceedings;

(b) after discovery of the representative plaintiff, the defendant may apply to the court for leave to discover other members of the class;

(c) in deciding whether to grant leave to discover other members of the class, the court shall consider,

(i) the stage of the class proceedings and the issues to be determined at that stage;

(ii) the presence of subclasses;

(iii) whether discovery is necessary for the purpose of the defence on the issues;

(iv) the approximate monetary value of the individual claims, where monetary relief is claimed;

(v) whether discovery will result in oppression, undue annoyance, burden or expense for the members of the class; and,

(vi) any other matter the court considers relevant.

(d) a member of the class is subject to the same sanctions under the rules of court as any party in a proceeding for failure to submit to discovery;

(e) the defendant shall not by subpoena require a member of the class other than the representative plaintiff to attend to be examined for the purpose of using his or her evidence upon any motion or application except by leave of the court, and in deciding whether to grant such leave, clauses (b), (c) and (d) apply mutatis mutandis.

Discussion

- With very few exceptions, the discovery process should be as much like ordinary proceedings as possible.

- Section 19(a) should not be interpreted as excusing plaintiffs from discovery simply because some expense or burden may be encountered. Reasonable efforts should be expected from the class members.

AGGREGATE ASSESSMENT OF MONETARY RELIEF

20. - In a class proceeding where,

(a) monetary relief is claimed on behalf of some or all of the members of the class,

(b) no questions of fact or law other than the assessment of monetary relief remain

to be determined in order to establish the quantum of liability of the defendant to some or all members of the class; and

(c) the total amount of the defendant's liability, or part thereof, to some or all of the members of the class can be reasonably determined without proof by the individual members of the class,

the court may determine the aggregate amount of the defendant's liability and give judgment accordingly.

Discussion

Every class proceeding will not necessarily be for monetary relief, some will inevitably seek injunctions, equitable relief and so on. However, where monetary relief is sought by the class and liability is not in issue (eg. liability is admitted) special methods of establishing the quantum may be appropriate. It may be impractical, for example, to require thousands of class members to individually prove their claims as they would in an ordinary proceeding. In such a case the court should be permitted to determine the total aggregate of the defendant's liability if to do so can be reasonably achieved.

INDIVIDUAL PROCEEDINGS

21. - (1) Where the court resolves the common issues in favour of the class, and determines that subsequent proceedings that require participation by members of the class and the defendant are necessary to determine individual questions, the court may,

(a) conduct such proceedings alone or with other judges of the court;

(b) appoint one or more persons to conduct such proceedings by way of inquiry and report; or

(c) on consent of the defendant, and of the representative plaintiff on behalf of the class, order any other such proceedings and give direction for the conduct thereof.

(2) The court may give such directions as may be necessary for the conduct of proceedings under clause (1)(a) or (b), including any directions to achieve conformity of proceedings, and in giving such directions the court shall order the simplest,

least expensive and most expeditious method of determining the issues that is consistent with justice to the members of the class, the defendant and the representative plaintiff, including dispensing with any procedure that it considers unnecessary and directing special procedures regarding such matters as discovery, admission of evidence and means of proof.

(3) The person who has conducted proceedings under clause (1)(b) shall record his or her findings in a report, but it shall not be effective until approved by the court with or without variation.

(4) The determination of any individual issues under this section constitutes a judgment.

22. - Where the court makes an order under section 25 concerning the manner in which a member of the class may claim his or her share of a judgment or where individual proceedings are required under section 21, a member of the class who fails to take such further action as is necessary to establish his or her entitlement to the relief claimed within the time prescribed by the court is not entitled to proceed under section 20 or 25 except by leave of the court.

Discussion

. These provisions enable the court to conduct such individual proceedings as may be needed once the common issues have been resolved.

JUDGMENTS

23. - (1) The court may direct that any amount awarded under section 20 shall be paid either in a lump sum, whether forthwith or within such period as the court may fix, or in such instalments and upon such terms and conditions as the court considers proper.

(2) The court shall supervise, and may stay for a reasonable period, the execution or distribution of the whole or any part of a judgment upon such terms and conditions as it considers proper.

24. - (1) Judgment on the issues common to the class is not binding upon persons who have excluded themselves from the class proceeding or upon the defendant in any subsequent proceeding brought by a person who has excluded himself or herself.

(2) Judgment on the questions common to the class binds every member of the class who has not excluded himself or herself from the class proceeding to the extent only that the judgment determines the questions common to the class that are defined in the order certifying the proceeding as a class proceeding and

that relate to the claim described and the relief specified in the order.

(3) A judgment on the questions common to the class shall,

(a) name or describe the members of the class or sub-class who are bound by the judgment;

(b) describe the nature of the claim made on behalf of the members of the class or sub-class and specify the relief awarded; and

(c) define the questions of fact or law common to the class or sub-class.

(4) A person who has not excluded himself or herself from a class proceeding is barred from bringing any proceeding in Ontario based on the same cause of action after the class proceeding has been determined on its merits.

Discussion

. Section 23 is designed to give the court some flexibility in determining how the judgment should be satisfied. A large monetary judgment may require instalments. Every effort should be made to ensure that businesses or farms are not forced to close because of judgments unless no reasonable alternative exists.

JUDGMENT DISTRIBUTION

25. - (1) In giving judgment the court may order that,

(a) the defendant distribute directly the amount of monetary relief to which each class member is entitled by any means authorized by the court including, but not limited to, abatement or credit,

(b) the defendant pay into court or some other appropriate depository the total amount of the liability to the class until further order of the court,

(c) the amount to which each class member is entitled be determined and distributed directly to such class members by any means authorized by the court,

(d) members of the class are entitled to share in such judgment on an average or proportional basis and make such determinations,

(e) any portion of the monetary relief that has not been distributed be applied in a manner that may reasonably be expected to benefit members of the class by any means authorized by the court,

(2) In making an order under subsection (1)(a) the court shall have regard to whether the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant.

(3) In making an order under subsection (1)(c) the court shall have regard to whether the identity of members of the class and the individual amounts of monetary relief can be determined without requiring evidence from each class member.

(4) In making an order under subsection (1)(d) the court shall have regard to whether the circumstance render impracticable the determination of the members of the class who are entitled to share in the judgement or the exact share of the judgement that should be allocated to particular class members.

(5) In making orders under subsections (1) (b) (c) (d) or (e) the court shall afford the members of the class a reasonable opportunity to establish their claims to their respective entitlement.

(6) In making orders under subsection (1)(e) the court may order that any such distribution be undertaken by the defendant upon such terms and conditions respecting its use as the court considers proper.

(7) The fact that an order under subsection (1) (d) or (e) may benefit persons who are not members of the class or who have already received monetary relief is not a bar to the court making such an order if the court is satisfied that a reasonable number of members of the class who would not otherwise receive monetary relief will benefit thereby.

(8) For the purpose of establishing the claims of members of the class, the court shall authorize such procedures as will minimize the burden imposed upon the class members, and such procedures may include the use of standardized proof of claim forms designed to elicit the information necessary to establish and verify such claims, the receipt of affidavit, documentary, or other written evidence, and the auditing of claims upon a sampling or other basis.

(9) Notwithstanding any of the above provisions, where the court makes an award of damages in favour of specific members of the class and any amount so ordered remains unclaimed after a

date fixed by the court, the amount shall be returned to the defendant without further order of the court.

Discussion

. This provision is designed to enable the court to make a variety of orders when fixing and distributing the judgment. Paragraphs 25(1)(a) to (e) will enable the court to distribute directly to class members, order the defendant to pay directly, distribute to class members proportionally or on average and so on. The court should have maximum flexibility in ensuring a fair distribution of an award. This is particularly so, for example, in environmental cases which may call for amounts to be distributed directly to injured class members and for the application of portions of the monetary relief in a manner that may be expected to benefit some or all of the members of a class.

LIMITATIONS

26. - (1) Any limitation period applicable to a cause of action advanced in a proceeding under this Act is suspended for the members of the class upon the commencement of the proceeding and resumes running against a member of a class,

(a) upon his or her exclusion from the class proceeding;

(b) upon an order decertifying a proceeding pursuant to section 9; or

(c) upon dismissal of the proceeding without an adjudication on the merits.

(2) For the purpose of subsection (1), the limitation period resumes running as soon as all rights of appeal have been exhausted or all appeals have been disposed of, as the case may be.

Discussion

. Given the number of potential class members and the fact that many of them are absent and require protection, care must be taken to ensure that their rights are not prejudiced by the commencement of a class proceeding. Limitation periods are therefore suspended until a party decides to act alone (opting-out) or until determination has been made in the proceeding itself.

SETTLEMENT AND ACCOUNTING TO CLASS

27. - (1) A proceeding commenced under this Act shall not be settled, discontinued or dismissed for want of prosecution without the approval of the court and upon such terms and conditions, including notice or otherwise, as the court considers proper.

(2) Unless otherwise agreed by the parties, the cost of any notice ordered under this section shall be determined by the court.

(3) In approving a settlement, discontinuance or dismissal pursuant to subsection (1) the court may order the representative plaintiff to provide the class with a written accounting of the conduct of the proceeding, the result, and the planned distribution of any settlement.

Discussion

- The court must supervise and scrutinize all settlements of a class proceeding to ensure that the absent class members have been protected. This is especially so since once settled the result will be binding for everyone except those who chose to opt-out.

APPEALS

28. - (1) An appeal lies to the Divisional Court from an order refusing to certify a proceeding as a class proceeding or setting aside an order certifying the proceeding as a class proceeding.

(2) An appeal lies with leave to the Divisional Court from an order certifying a proceeding as a class proceeding.

(3) For the purpose of subsection (1) or (2), if the representative plaintiff does not appeal or if he or she abandons his or her appeal, any member of the class may apply to a judge of the High Court for leave to appeal on behalf of the class or appeal as of right as the case may be.

29. - (1) An appeal lies to the Court of Appeal from a judgment on the questions common to the class.

(2) For the purpose of subsection (1), if the representative plaintiff does not appeal or if he or she abandons his or her appeal, any member of the class may apply to the Court of Appeal for leave to appeal on behalf of the class.

30. - Where judgment has been given in favour of individual members of the class, any member of the class who has been awarded more than $3,000 may apply to a judge of the Divisional

Court for leave to appeal to that court.

31. - Where an order has been made under section 20, the representative plaintiff or the defendant may appeal to the Court of Appeal.

Discussion

- Appeals are a necessary element of the new procedure and these provisions ensure the customary access to a higher court on important questions.

COSTS AND FEES

32. - (1) Subject to the provisions of this Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

(2) Subsection (1) applies to both common and individual proceedings under this Act.

(3) In exercising its discretion under subsection (1) the court may have regard to the fact that the issue in dispute was in the nature of a test case, raised a novel point of law, or concerned a matter of public interest.

(4) Except with respect to individual proceedings, the members of the class, other than the representative plaintiff, are not liable for costs.

33. - (1) Notwithstanding section 30 of the Solicitors Act and An Act Respecting Champerty, a solicitor may make an agreement in writing with the representative plaintiff regarding payment for fees and disbursements in respect of a proceeding commenced under this Act stipulating for payment only in the event of success in the proceeding.

(2) For the purpose of this section, success in the proceeding includes a judgment in favour of some or all members of the class on the questions of fact or law common to such members or a settlement that benefits any member of the class.

(3) An agreement under this section shall be in writing and must stipulate the fees and disbursements arrangement between the representative plaintiff and the solicitor including the expected fee whether by gross sum, salary or otherwise but shall not include a fee based on a commission or percentage of the damage award except as may be allowed by the Solicitors Act from time to time.

(4) In the event the fees and disbursements arrangement between the representative plaintiff and solicitor is dependant

upon the solicitor seeking at the conclusion of the matter a multiplier of his or her fees to compensate for the risk of undertaking the litigation, the intention to seek a multiplier must be disclosed in the agreement with the representative plaintiff.

(5) Where the representative plaintiff and his or her solicitor have made an agreement stipulating for payment by way of multiplier only in the event of success, the court that has given judgment on the common questions or has approved a settlement shall, at the conclusion of any individual proceedings or at such other time and upon such terms and conditions as the court considers proper,

(a) determine the amount of the solicitor's base fees and, in addition thereto, may apply a multiplier which when applied to the fees results in fair and reasonable compensation to the solicitor for the risk incurred by him or her in undertaking and continuing the proceeding on a basis of payment only in the event of success by settlement or judgment; and

(b) determine the amount of disbursements to which the solicitor is entitled, including interest thereon calculated on the balance of disbursements incurred as totalled at the end of each six month period following the date of the agreement.

and shall order that such amounts be paid to the solicitor in accordance with subsection 9.

(6) For the purposes of this section a multiplier is a multiple applied to a reasonable base fee comprised of the total number of hours reasonably worked multiplied by an appropriate hourly rate which properly reflects the risk of the solicitor in undertaking and continuing the proceeding.

(7) In fixing a multiplier for the purposes of (5)(a) the court shall only have regard to the risk incurred and to the manner in which the solicitor has conducted the proceedings.

(8) Any agreement with respect to fees and disbursements, whether or not it contains a stipulation for payment only in the event of success, must be approved by the court.

(9) Once approved by the court, the class solicitor's fees and disbursements shall be a first charge on the settlement funds or monetary award.

(10) Any agreement with respect to fees and disbursements that does not contain a stipulation for payment only in the event of success in the proceeding may be assessed in accordance with the Courts of Justice Act, 1984 and the rules of court.

Discussion

- Section 32(1) is drawn from section 141 of the Courts of Justice Act, 1984.
- See the discussion in Chapter 5 under the "Costs Assistance Fund".
- The Committee notes that Rule 57.07, which provides costs sanctions against lawyers personally, would apply to the court's deliberations about the most appropriate cost award.
- The Committee notes again the need for the Law Society of Upper Canada to consider the form of written retainers between lawyers and class representatives.
- Subsection 8 contemplates interim payments being made to the lawyer for the class by the representative plaintiff prior to court approval. Such payments would be subject to possible adjustment at the time of court approval.

COSTS: MISCELLANEOUS

34. - Where the fees and disbursements are not approved pursuant to subsection 33(8), they shall be determined,

(a) by a judge,

(b) by inquiry and report, or

(c) such other method considered appropriate by the court.

35. - (1) Where individual proceedings are ordered under section 21 and the defendant is ordered to pay an amount of monetary relief to a class member, it shall not be paid to the class member but shall be paid into court until further order.

(2) Upon the determination of the amount and method of the solicitor's payment, the court shall order the distribution of the amounts to which individual class members are entitled.

36. - In any individual proceedings,

(a) the costs provisions of the rules made with respect to Provincial Court (Civil

Division) apply to claims of $3,000 or less; and,

(b) the costs provisions of the Courts of Justice Act and of the rules of court apply to all other claims.

37. - The court may order that the costs of any distribution of a monetary award, including costs of notice and payment of an appropriate fee to the person administering the distribution, be paid out of the proceeds of the judgment or make such other order it considers proper having regard to all the circumstances of the case.

Discussion

- With respect to section 37, distribution of individual entitlements can be a time consuming process involving potentially thousands of claimants. The U.S. experience with class actions has included individuals or companies that charge a fee for delivering such a service or the representative plaintiff's lawyer doing so. A reasonable administrative fee may be called for and should be fixed and paid for out of the proceeds.

OFFERS TO SETTLE

38. (1) The representative plaintiff or the defendant may serve on the other party an offer to settle a proceeding under this Act and the Rules of Civil Procedure apply.

(2) Where a party serves an offer to settle pursuant to the rules of Civil Procedure, the party so serving the offer shall move for directions with respect to the need for notice to absent class members.

Discussion

- Class proceedings which have been certified have a high rate of settlement. Ontario's Rules of Civil Procedure, especially with respect to offers to settle, and costs rules work in tandem to speed settlements. These procedures should apply equally to class proceedings.

EVIDENCE

39. - (1) In addition to the existing rules of evidence the court may admit, with respect to the issues of quantum or distribution of monetary awards, statistical evidence, including evidence derived through sampling, if such evidence was compiled in accordance with principles accepted by experts in the

particular field.

(2) Without restricting the generality of subsection (1), a collection, compilation, analysis, abstract or other record or report of statistical information prepared or published under the authority of the Parliament of Canada or the legislature of a province or territory of Canada may be admitted in evidence without proof.

(3) Statistical, including sampling, evidence under subsection (1) or (2) is not admissible unless the party intending to introduce it has given reasonable notice to the party against whom it is intended to be introduced together with a copy of such evidence.

(4) Where evidence is of a kind mentioned in subsection (2) or is derived from market quotations, tabulations, lists, directories or other compilations generally used and relied upon by the public or by persons in particular occupations, any notice given under subsection (3) shall specify the source of such evidence.

(5) Except where subsection (4) applies, notice given under subsection (3) shall specify the name and qualifications of the person responsible for the preparation of the statistical or sampling evidence and shall specify whether any additional documents were prepared or used in the compilation of such evidence, and any party who receives such a notice may require that any such document be produced for inspection, except documents that would reveal the identity of any persons responding to a survey who have not consented in writing to such disclosure.

(6) Any party against whom any evidence of a kind mentioned in subsection (4) or (5) is introduced may require for the purpose of cross-examination the attendance of any person under whose supervision the evidence was prepared.

Discussion

. The Committee notes that this section should not be interpreted as requiring the court to consider such evidence or as making such evidence determinative of the issues. This provision is designed to facilitate evidence gathering among a potentially huge class of individuals. The court would continue to be in the position of attaching whatever weight it felt appropriate to the evidence tendered.

GENERAL

40. - In a proceeding under this Act, the same judge shall hear all motions before the trial of the questions common to the class and unless the parties and judge otherwise agree, another judge shall preside at the trial of the questions common to the class and related matters.

41. - The rules of court, except to the extent that they are inconsistent with this Act, apply to proceedings under this Act.

42. - The Rules Committee may make any rules under the Courts of Justice Act necessary or advisable to carry out effectively the intent and purpose of this Act.

43. - The Crown is bound by this Act.

Discussion

- The Committee was of the opinion that one judge should be responsible for the management of a class proceeding until the trial. This would allow the application of recent case management techniques to what is potentially complex litigation. Another judge would have responsibility for the trial of the common questions.

COSTS ASSISTANCE FUND

44. - (1) A commission to be known as the Costs Assistance Fund is established.

(2) It is the duty of the Costs Assistance Fund to collect and distribute funds to provide plaintiffs in class proceedings with assistance in the payment of disbursements, the costs of notice, the costs of experts and indemnification for adverse costs awards.

45. - The Lieutenant Governor in Council may make regulations respecting any matter referred to as prescribed by the regulations.

Discussion

- See the discussion in Chapter 5 under the heading "Costs Assistance Fund".

- While not identical, the Committee views this fund as possibly being at least administratively similar to the Quebec funding scheme. One significant difference is that the Quebec model provides the representative plaintiff with assistance in paying legal fees. The Committee's recommendations for funding assistance

relate only to disbursements and indemnification for adverse costs awards. The Committee was of the opinion that its recommendations concerning lawyers' fees would enable the lawyer for the class to underwrite the cost of litigation. This would eliminate the need for assistance from the fund for legal fees.

EFFECTIVE DATE

46. - This Act comes into force on the day of 1990.

47. - This Act does not apply to:

(a) any proceeding commenced before this Act comes into force;

(b) any proceeding brought by a person in a representative capacity that is authorized by any other Act; or

(c) any proceeding that before this Act comes into force was required to be brought by a person in a representative capacity.

48. - The short title of this Act is the Class Proceedings Act, 1990."

Discussion

The Committee recommends the above transition which would make the new procedure available for any cause of action not already barred by the appropriate limitation.

CHAPTER 5

Related Matters and Recommendations

During the course of its deliberations the Committee identified a number of issues that merited special comment. This chapter identifies these issues and the Committee's recommendations.

* The Costs Assistance Fund

The Committee has recommended in section 32 of the Draft Act retention of the existing cost rules for civil litigation in Ontario. A successful party is entitled to its costs upon a fixed scale (party and party, solicitor and client, or as between a solicitor and his or her own client) unless the court orders otherwise. It is said that costs "follow the event" - in other words the successful party has its costs paid by the unsuccessful party. This accountability for the successful party's costs often causes the litigants to reflect upon the viability of the litigation and the likelihood of success. It may also discourage a party from instituting a proceeding where the cause of action (or procedure itself) is new, risky or unusual. The same is true where the amount claimed on behalf of individual class members is relatively small.

The Committee's retention of the existing costs regime for class actions was based in part on a number of considerations, including:

> (i) that the court should be able to depart from this regime if the plaintiffs could be considered to have undertaken a claim or step in the proceeding that was a test case, a novel point or was in the public interest; and
>
> (ii) that the Government, in co-operation with non-government sources and through a variety or combination of methods, should establish a fund to assist parties to class proceedings.

These considerations act in different but complementary ways. In the first case it allows the court to provide a judicial release from the cost consequences of an unsuccessful proceeding. This leaves the risk of being held accountable for costs in the mind of the plaintiff, thereby deterring weak claims and wasteful steps and moderating the approach to the litigation. At the same time it provides less disincentive to test the new procedure in ways which may benefit the public.

The second consideration, a fund, operates in a different way. Since the class proceeding is designed by its very nature to draw numerous claims together, it necessarily involves a representative from the group litigating on behalf of the class. As the use of the procedure entails exposure to the costs rules described above, acting as the representative plaintiff will mean running the risk of being responsible for the class' costs if the

action is unsuccessful, as well as the defendant's costs in defending the class proceeding. These costs could be substantial. It will also mean the commitment of resources to expenses such as experts' opinions, notice to other class members and so on. Few private individuals could afford to undertake such financial risks and obligations. In other cases the class might well be able to fund the proceeding. Class members, for example, may have significant assets and may be prepared to underwrite the class proceeding. These however would be relatively rare.

The problems in financing a class proceeding are particularly acute in cases where the amount sought on behalf of each member of the class is relatively small. Consider the case of users of a transit system denied access to it by an illegal strike (as was the case in Quebec). Tens of thousands of transit users who had purchased monthly transit passes did not receive full value for their purchase during the strike. If the loss of value was, for example, less than ten dollars per user, it would be unlikely that any one transit rider would come forward and act as the representative plaintiff. To do so under the existing costs regime would expose such a person to liability for the other sides's costs if the lawsuit were ultimately unsuccessful. Even attempting to collect money from the class members is impractical in some cases and impossible in others because their names are not known and the cost of soliciting the money exceeds

the revenues raised.

The transit example above provides one illustration but the same is true whether the claim concerns:

- overcharging by utilities,
- fraudulent mail-order schemes,
- small products liability incidents,
- excessive charges on bank services and so on.

There may be other ways of solving such problems, but the Committee is of the opinion that such claims should be capable of redress in our justice system and that one method that should be available is an accessible class proceeding.

However, the Committee is also of the opinion that the existing costs regime should not be completely restructured simply to accommodate class proceedings. The answer to accessibility is not the removal of all risk of the obligation for costs but, rather, the support of worthwhile class proceedings through assistance with disbursements and protection against adverse costs awards. The fund need not be responsible for plaintiffs' counsel's legal fees. Those fees can be the responsibility of the class and representative plaintiff and are a matter between the class and their lawyer.

The Committee noted the terms of reference established by the Attorney General and in particular the wish to develop a

procedure that was balanced and did not give special treatment to either the plaintiff or the defendant. These conclusions with respect to costs are consistent with that mandate. The Committee concluded that if the Government is committed to reform in this area and committed to increasing access to justice it will provide whatever assistance it can to establish the fund, adequately endowed, to assist class litigants.

The Committee's reasoning in this respect is worth setting out with some particularity. Class proceedings are on one level procedural vehicles that offer a more efficient method of bringing particular disputes before the courts. The procedure should be more accessible because it lowers the unit cost of litigation, economizes judicial resources and, finally, allows otherwise uneconomical claims to obtain their "day in court". In this last respect the Committee concluded that to achieve this type of accessibility, singling out class procedure for special costs treatment was not the answer. Rather, the answer lies in making a commitment to assisting litigants in mass litigation to bring their disputes forward, thereby benefiting the public at large.

The assistance contemplated by the Committee does not necessarily mean public funding of litigation before the courts. There are precedents in a number of jurisdictions for creative and co-operative methods of creating funds or methods to assist

with socially worthwhile litigation. Consider the following examples:

i) The Quebec Class Actions Fonds

The Quebec Class Actions Fonds, formally the "fonds d'aide aux recours collectifs", is an agency set up under the Quebec Act respecting class actions[5] to ensure that such actions are adequately financed. The Fonds, whose administrators are appointed by the government, is not part of the Quebec legal aid scheme but is financially accountable directly to the Minister of Justice. In addition the Fonds must submit an annual report of its activities to the Minister who tables the report before the National Assembly.

Any representative plaintiff or person intending to claim representative status can apply to the Fonds for financial assistance. Allowing applications from persons intending to claim representative status permits potential representative plaintiffs to receive funding for the potentially lengthy and costly stage of certification.

The base criterion for acceptance of an application for financial assistance by the Fonds is whether the class action would be commenced or continued without such assistance. For

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[5] R.S.Q. 1977, Ch. R-2.1.

applicants who have not yet achieved representative status there are two additional criteria: the probability of the existence of the right sought to be asserted and the probability the class action will be brought.

If an application is accepted, the Fonds reaches an agreement with the applicant regarding the terms and conditions of assistance. The Fonds, in accordance with this agreement and with the Act, may pay the legal fees of the representative plaintiff, the fees of experts and advocates-counsel acting for the plaintiff, and any other costs or disbursements of the plaintiff expedient to the bringing of the action. In addition, if the representative plaintiff loses the action and the defendant is awarded costs, the Fonds, if satisfied that the plaintiff lacks adequate financial resources to pay the costs award, may pay costs to the defendant on the plaintiff's behalf.[6] If, on the other hand, the representative plaintiff is awarded costs, he or she must reimburse the Fonds to the amount of costs awarded.

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[6] Note that the Fonds may claim against the representative plaintiff for the costs paid on his behalf. However, in practice, such claims have not been made. The costs payment provision is discretionary and is used only for the benefit plaintiffs with inadequate financial resources. It is likely that the Fonds would seek repayment only if fortunate circumstances radically improved a plaintiff's financial circumstance after costs were paid on his behalf. See Louise Ducharme and Yves Lauzon, Le recours collectif Quebecois (1988) at 236.

To insure that the Fonds is self-financing in the long-term the Quebec class actions act provides that a percentage of all recovered claims shall be withheld by the Fonds. The percentage rate of withholding is set by regulation.

ii) Ontario Funding of LEAF

The Women's Legal Education and Action Fund (LEAF) has received funding from the Ontario government to undertake Charter litigation of benefit to Ontario plaintiffs. LEAF is an independent, incorporated organization and receives funding from other sources in addition to that given by the Ontario government. To date LEAF is the sole independent group to receive funding from the Ontario government for public interest litigation.

Funds committed to LEAF in an October 15, 1988, announcement of the Ontario government amount to $1,000,000. Payments out of these monies are made periodically to LEAF. By the terms of the grant, LEAF's fund from the Ontario government is to be used solely to challenge Ontario provincial legislation or to represent the interests of Ontario plaintiffs.

iii) The Ontario Intervenor Funding Project Act

The Ontario Intervenor Funding Project Act[7] sets up a three year pilot project to allow the Environmental Assessment Board, the Ontario Energy Board and joint boards set up under the Consolidated Hearings Act, 1981 to provide funding for public interest intervenors.

Applications for intervenor funding are determined independently and subsequently to determinations of intervenor status. A panel of the board holding the hearing is charged with determining funding eligibility. The funding panel is to award funding only if the issues in relation to which funding is sought affect a significant segment of the public and affect a public as opposed to just a private interest. In addition, the funding panel must consider the financial position and responsibility of the applicant, the applicant's record of commitment to the interest, whether the applicant represents a clearly ascertainable interest and would contribute significantly to the hearing, and a number of other factors.

If a funding award is made it is paid by the "funding proponent", that is, the party or parties determined by the panel to be the most appropriate to pay funding among those whose undertaking is the subject-matter of the hearing or who are

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[7] S.O. 1988 Ch. 71.

potentially major financial beneficiaries of the board's decision. The Board may refuse to award funding or reduce the amount of funding after taking into account the financial situation of the funding proponent.

Funding for lawyer's fees are set at the legal aid rate and a ceiling is set on funding for disbursements. In addition the funding panel may deduct from the award "funds that are reasonably available to the applicant from other sources." The Board deducts any funding received by the intervenor from costs awarded to the intervenor

iv) Manitoba Legal Aid Group Funding[8]

In 1982, the Legal Aid Services Society of Manitoba Act was amended to allow public interest groups to receive full or partial legal aid. The criteria for funding are two-fold, the group must be pursuing a common interest or objective in its legal action and the matter must be one of public interest. In addition, the group must meet financial eligibility requirements. The Act is drafted to allow Legal Aid Manitoba (LAM) broad discretion in applying these criteria. Legal aid is awarded on a certificate basis, but the award may stipulate whether the case may be taken by a member of the private bar or is to be assigned

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[8] See William Greenaway, The Public Interest Department, Legal Aid Manitoba: An Evaluation (1984).

to the litigators at the Public Interest Department of the LAM.

v) The "New York Milk" Fund

In 1988 Attorney General Robert Abrams of New York State obtained a judgment in an antitrust case against Dailylea Corporation Inc. After partial distribution of the judgment it was determined that interest had accrued on the remaining balance. Attorney General Abrams made submissions to the court that some of the undistributed balance of the judgment be used to create the New York Milk Antitrust Litigation Fund. Approximately $500,000 is currently being held by the National Association of Attorneys General in Washington D.C. for use by other state Attorneys General in bringing antitrust suits. The funds can be used for expert witnesses, economists and statisticians. Similar court orders are being sought to ensure that the fund is replenished.

vi) The U.S. Class Action Reports Fund

A private foundation gave the Class Action Reports (a class action periodical) approximately $50,000 several years ago. The fund has been held in a private non-profit foundation and considers applications from private litigants. It also requires a commitment from applicants to return cost awards or portions of any settlements to the fund. Most of the original endowment has

been disbursed.

As can be seen from the above precedents, imaginative yet workable methods exist for assisting litigation that is in the public interest. The Committee therefore recommends the creation of a "Costs Assistance Fund" for class proceeding litigants. The Class Proceedings Act should provide the authority to establish such a fund. Its actual structure and methods could be established administratively or through regulation. The Quebec model should be given consideration in this regard.

In the Committee's opinion a "Costs Assistance Fund" is both desirable and possible. The Committee recommends that a model which is self-funding (even in part) be considered. However, "self-funding" does not preclude the need for seed money from either the provincial government or other sources both public and private. Any government contribution to the fund could be made on the basis that it would be repaid within a fixed period once the fund was self-sufficient.

The Ministry of the Attorney General should be given responsibility for investigating the best method of establishing the fund and could even co-ordinate the contribution of funds from non-government sources such as the Laidlaw Foundation, the Law Foundation, the Donner Foundation and others likely to have an interest in encouraging access to justice in Ontario.

The Committee notes that any such contributions, whether from public or private sources, could be considered only the "seed money" and that the fund may be able operate on the basis that it would be self-sustaining as quickly as possible.

The Committee notes that the self-sustaining feature of the fund might be achieved in part through a levy on judgments in class proceedings. This might be done on a mandatory or voluntary basis. In the latter case, any class that sought assistance from the "Costs Assistance Fund" would be required to agree to a percentage levy against any monetary recovery. For example, if a class was successful in obtaining a five million dollar judgment against a fraudulent mail order business and had done so with the assistance of the fund, then a fixed percentage levy would be applied against the judgement. This amount would be contributed to the fund to assist with future class litigation and reimburse the assistance received.

Actuarial assistance will be needed to identify the most appropriate funding mechanism for the "Costs Assistance Fund". If a self-funding or partially self-funding model is adopted, then this actuarial assistance will be required to establish the appropriate amount of seed money, appropriate percentage levy on judgments and, for example, the time period within which the Government could expect repayment of an initial contribution (if

any).

The Committee also recommends consideration of the following aspects of such a fund:

* The administrative structure of the plan should contemplate screening of applicants. Costs assistance should not be automatic, but should be based on a test that examines the key question: "Would this proceeding be initiated unless the representative plaintiff received assistance from the fund?"

* The administrative structure should contemplate a requirement that applicants disclose their own plan for funding of the litigation. For example there could be an obligation to use best efforts to solicit and secure funding from class members. The administrators of such a fund should also examine what is at stake in the litigation and the likelihood of recovery.

* There should not be a mandatory requirement to solicit funds in all cases from the class prior to seeking or obtaining funding from the "Costs Assistance Fund".

* The "Costs Assistance Fund" should be capable of assisting the representative plaintiff with disbursements, but not in the payment of the plaintiff's counsel's legal fees. The

fund should be available for notice costs and fees of experts.

* The only legal fees the fund should be responsible for would be through indemnification for a successful defendant's costs as assessed against the plaintiff at the conclusion of the trial and/or appeal.

* A denial of a request for funding should be appealable.

* The method of the Quebec fund of turning over a percentage of monetary awards on a sliding scale might be considered as a possible method to secure further sources of funds for the "Costs Assistance Fund".[9]

* Consideration should be given to applying a mandatory levy against all class proceeding judgments whether the "Costs Assistance Fund" was used or not.

* Actuarial analysis of the means by which the fund could become self-sustaining could include consideration of empowering the court, at the conclusion of the trial, to first, assess the monetary award (if any), then to assess the percentage contribution to be levied from the award, and finally, to fix the percentage levy against any

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[9] See Ducharme & Lauzon, p. 280.

undistributed portion of the monetary award that will be remitted to the "Costs Assistance Fund".

* If the fund could be established on a not-for-profit basis, consideration should be given to the possibility of issuing tax receipts for donations made to the fund by private donors or foundations.

* The fund should operate at arms length from the Provincial Government since the Government may be a defendant in proceedings. Funding determinations should be made by a board that is representative and include, for example, consumer representatives among others.

The Committee did not have the resources available to it to be able to investigate all of the questions and issues that arise around the creation and endowment of such a fund. However, the existence of the Quebec Fonds and the very creative methods undertaken in Ontario to date indicate that such a fund is not only possible but necessary.

The Committee recommends that the Ministry of the Attorney General undertake immediate research into the best method of establishing and endowing such a fund. The members of this Committee are prepared to make themselves available on an ongoing

basis to assist in designing this fund as quickly as possible. The matters identified in these few paragraphs are just a sampling of the options that should be given consideration.

In terms of the actual amount of funding needed to start such a fund the Committee is not in a position to make a specific recommendation but notes that Quebec's Fonds was started with $250,000 and that the New York Milk Fund was started with $500,000. A group of persons knowledgable in financing of such a fund could determine a specific amount for commencement of such a fund.

The Committee considered possible alternatives to the above funding recommendation but declined to make alternative recommendations. To make alternative proposals on costs would require revisiting and possibly altering other parts of the model developed. This would inevitably jeopardize the unanimity of the Committee and undercut the value of the recommendations. As such, the Committee's model stands as the sum of its parts. It should not be implemented in part (for example, without the "Costs Assistance Fund") since the certification test, costs regime and "Costs Assistance Fund" are interdependent.

In summary, the Committee recommends that the Government establish a "Costs Assistance Fund" as a part of the reforms and that research on the best method of its establishment and

endowment be the responsibility of the Ministry of the Attorney-General. Committee members stand ready and willing to assist the Ministry of the Attorney General in this regard.

* Legal Education

The Committee noted that a more accessible and useful class proceeding would require legal education for the legal profession, the judiciary and the public.

The legal profession in Ontario has a solid reputation for providing quality continuing legal education and can be expected to move quickly to educate lawyers once the new procedure is available. Proclamation should accommodate the bar's needs in this respect.

Reaching the judiciary can be more difficult. To avoid any misunderstanding about the purpose and function of a new class proceeding the Committee recommends that specific efforts be made to provide the Ontario judiciary with quality legal education on this matter, as well as sufficient lead time to understand the new procedure.

Finally, the public at large has a considerable stake in the new procedure and special efforts should be made to produce quality public legal education materials. Consumers, business people, union's, women's groups, to mention only a few, will have a need for understandable information about class proceedings. The Committee recommends that the Ministry of the Attorney General co-ordinate public legal education on this issue in co-

operation with the legal profession and other providers of public legal education in the province.

* Uniform Law Conference - 1990

The Uniform Law Conference of Canada approved class action reform in general terms in August of 1988. The procedure recommended by this Committee is more comprehensive and more detailed than that approved by the Uniform Law Conference but, for the most part, is consistent with the Uniform Law Conference approach as established in 1988.

The Uniform Law Conference deferred its consideration of a Draft Class Action Act in 1989 pending the conclusion of this Advisory Committee's work. The Committee recommends that the Draft Act proposed herein be considered by the Uniform Law Conference, through the Ontario Commissioners, at its 1990 meeting in New Brunswick. Mass injury and loss will inevitably cross provincial borders and uniformity of procedure is therefore very desirable.

* Alternative Dispute Resolution

This expression is often used to describe such alternatives to the adversarial process as mediation, arbitration, and even case management techniques. There is a growing interest in how

such methods can be used to offer those with legal disputes more flexibility in resolving issues and in moving such disputes through the process. The Committee did not investigate the suitability of using alternative dispute resolution techniques within the context of class proceeding litigation. However, the Committee was of the opinion that such research is warranted and urges the Ministry of the Attorney General to investigate any means by which alternative dispute resolution can be used in the context of class proceedings to resolve potentially large substantive and procedural issues such as the distribution of large awards to numerous persons.

* Monitoring the Legislation

A significant issue during early consideration of the need for class proceeding reform was the concern that class proceedings would become an unwieldy procedural imposition on the courts and the administration of justice. Reliance has been placed on experience and statistics gathered in the United States and Quebec. Neither of these jurisdictions is identical to Ontario.

The Committee recommends that the Ministry of the Attorney General establish a method by which class proceedings instituted in Ontario are identified and monitored. This system would be established with a view to developing an information base from

which the new procedure's performance can be evaluated. In the early years of such a procedure it will be important to know what sorts of substantive claims are advanced within a class proceeding, how numerous are the classes, what effect does certification (and each element of the test) have on advancement of claims, how long does a proceeding take, at what rate and point are cases settled and on what terms, whether a judicial attitude about the procedure has emerged, the role of the legal profession and contingency fees and so on. This type of information will allow a balanced review of the procedure and will form the basis of discussions around fine tuning the procedure or any possible need for more significant change.

* The Ontario Law Reform Commission

The Committee wishes to acknowledge its debt to the Ontario Law Reform Commission. Its 1982 Report on Class Actions continues to be the definitive source on class proceedings and the experiences of other jurisdictions. In particular, the Draft Bill entitled "An Act Respecting Class Actions", which appears at the end of Volume III of the Commission's Report provided a useful working text for the Advisory Committee

REPORT OF THE ATTORNEY GENERAL'S ADVISORY COMMITTEE ON CLASS ACTION REFORM

PART II

APPENDICES

FEBRUARY 1990

REPORT OF THE ATTORNEY GENERAL'S ADVISORY COMMITTEE ON CLASS ACTION REFORM

PART II
APPENDICES

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6. Australia - Grouped Proceedings in the Federal Court, The Law Reform Commission, Report No. 46 (Canberra, 1988).

Ontario

NEWS RELEASE
COMMUNIQUÉ

Ministry of the Attorney General | Ministère du Procureur général

ATTORNEY GENERAL ANNOUNCES CLASS ACTION REFORM

JUNE 29, 1989

The Government of Ontario has taken a decision to bring forward legislation to make class actions available in Ontario, Attorney General Ian Scott announced today.

Class actions permit numerous individuals who have suffered a common wrong to seek redress as a group, rather than as individual litigants. Well designed class action remedies can provide access to justice for individuals while economizing the use of scarce court resources, Mr. Scott added.

Examples of situations in which a class action could be used include the Mississauga train derailment, the Dalkon Shield Case, mass environment disasters and hazards, defective products, and consumer losses arising from failed health clubs.

The Ministry of the Attorney General has established a formal class action consultation process with representatives of government, lawyers, business and consumers. The participants are the Canadian Federation of Independent Business, the Canadian Manufacturers' Association, Retail Council of Canada, the Ontario Chamber of Commerce, the Consumers Association of Canada, the Canadian Environmental Law Association, the Advocates Society, the Canadian Bar Association, Energy Probe, and the Insurance Bureau of Canada.

The consultations will start from the premise that the class action remedy will treat plaintiffs and defendants in a fair and equitable manner, and will impose no unnecessary burdens on the courts. The remedy will include a structured certification procedure in which a judge will screen potential class actions according to specific tests, a rule that all class members who do not specifically opt out will be included in the action, a presumption that notice will be given to class members

over...

following certification unless otherwise ordered by the court, a controlled contingency fee arrangement, no special role for the Attorney General in class actions, and the return of undistributed awards to the defendant following the expiry of the relevant limitation period except with respect to environmental cases which will be given further consideration by the Advisory Committee.

Mr. Scott added that the government intends the new class action remedy to apply in all types of claims and that balanced court rules and procedures should apply to this unique remedy. In particular, it will be applicable in environmental litigation and in consumer litigation. The Ministries of the Environment and Consumer and Commercial Relations, which have been considering introducing class action remedies in their legislation, will contribute their expertise, but will leave the creation of a class action remedy to the Attorney General's consultation process while its work is ongoing.

It is anticipated that the consultation process will start this month. The government proposes to introduce legislation after this process is completed.

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APPENDIX A

Federal Rule of Civil Procedure 23

(a) PREREQUISITES TO CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the clas predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under the subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

APPENDIX B

Uniform Law Commissioners' Model Class Actions [Act] [Rule]*

Prefatory Note

A class action is an equitable concept which originated as an exception to the general rule in equity that all persons (however numerous) materially interested in the subject matter of a suit were to be made parties to it. The class suit was an invention of equity to allow a suit to proceed when the parties interested in the subject were so numerous that it would have been impracticable to join them without long delays and inconveniences which would obstruct the purposes of justice. Under these conditions representatives of a class conduct litigation on behalf of themselves and all others similarly situated and the judgment binds all members.

The first state statute on class suits was the 1849 Amendment to the Field Code of New York which attempted to codify the pre-existing equity law on representative suits. Two types of representative suits which could be maintained under the rules of equity were specially adopted as allowable under the Field Code. The first type of suit involved actions where the question was one of a common or general interest and one or more class members sued for the benefit of the entire class. The second type involved cases in which the parties were

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The Uniform Law Commissioners' Model Class Action [Act] [Rule] was originally adopted at its annual conference held between July 31 and August 6, 1976 under the title "Uniform Class Actions [Act] [Rule]." In August 1987, the name of the Act was changed to its current title. In addition, Section 6, on "Jurisdiction over Multi-State Classes," as originally adopted was repealed and the section was reserved. Section 19, on "Uniformity of Application and Construction," was also repealed, and subsequent sections 20-21 were accordingly renumbered.

The Act as reproduced here reflects all changes made in 1987.

very numerous and it was impracticable to bring them all before the court. A common interest or right was present among the members and the representatives sought to establish or enforce this right in order to benefit all the members of the class in common and injure none. Other states have adopted statutes modeled on these concepts.

In 1938 the Supreme Court adopted the Federal Rules of Civil Procedures including Rule 23 which governed class actions for federal courts. Many states have adopted a version of this rule. The 1938 Rule 23 created three separate categories of class actions based on the substantive character of the right asserted by the class and the *res judicata* effect of the class action judgments on nonappearing members. The first category, the "true" class suit, requires a common or joint cause of action that exists for all parties and the issues determined in the suit are preclusive to all class members. The second type is the "hybrid" suit requiring each member to have an interest in a specific fund or property which is in controversy and the judgment binds the rights of the class with respect to the property involved. The third type, "spurious," requires that a common question of law or fact affect the several rights involved and a common relief must be sought. The decree in such actions had no binding effect on nonappearing members. Class actions of the latter sort were merely invitations to join.

In 1966 Federal Rule 23 was amended. The new Rule 23 is divided into five subsections dealing with different procedural requirements for bringing a class suit. After satisfying the four prerequisites of subsection (a), a class suit must fit in one of the three categories of subsection (b) which describe appropriate occasions for maintaining a class action: 23(b)(1) where difficulties would be likely to arise if separate actions were brought by class members: 23(b)(2) where the party opposing the class has improperly acted on grounds generally applicable to the class so as to create a need for injunctive relief; or 23(b)(3) where common questions predominate over any questions affecting only individual class members and a class action is superior to other adjudicatory methods. A judgment under the amended rule binds all those whom the court finds to be members of the class. Several states have a version of this rule for their class action statute.

Presently three types of class action statutes predominate in the United States; (1) the Field Code provision, (2) state statutes modeled on Rule 23 of the Federal Rules of Civil Procedure as it existed prior to July, 1966, and (3) statutes modeled on the new Federal Rule 23. Some states still do not have a class action statute. State rules based

on the Field Code and the earlier Federal Rule pose distinct problems and disadvantages in maintaining class suits. Recent Supreme Court decisions have severely limited the availability of the present Rule 23 as a group remedy. In Zahn v. International Paper Co., 414 U.S. 291 (1973) the Court held that each of the class members in a diversity action under Rule 23 must satisfy the jurisdictional amount of more than $10,000 and any members who do not must be dismissed from the case. In Eisen v. Carlisle & Jacquelin, 417 U.S. 136 (1974) the Supreme Court interpreted Rule 23(b)(3) and (c)(2) to require personal notice of the action to all identifiable class members with service costs to be borne by the plaintiffs.

More classes with claims will be seeking redress in state courts because the federal courts have severely restricted the availability of class actions in their forum. Presently state statutes vary in their treatment of class actions. A strong need exists for states to adopt a uniform class action act. Many activities have impact on large numbers of persons often from several states. Adoption of a uniform act will assist states in handling multistate class actions, thereby reducing multiplicity of litigation and the chance of inconsistent judgments. The Act provides supervision of the adequacy of representation by the representative parties to insure that the interests of the class will be protected. Subsections to cover special problems of the class action are provided: notice techniques, discovery of the members of the class, effect of the judgment on the members of the class, methods of fashioning relief, and liability for costs and expenses.

This Act applies whenever an action involving a class is commenced. When a final order refusing to certify a class action is entered, the application of this Act will terminate. The scope of this Act is similar to that of F.R.C.P. 23 and does not cover derivative actions by shareholders or suits by unincorporated associations.

Within the limits of practicality, due process requires that all individuals be afforded a meaningful opportunity to be heard, Boddie v. Connecticut, 401 U.S. 371 (1971). A class action is a procedure by which people with small claims or limited means can exercise their rights and thereby make our system of justice more responsive to their needs.

Section 1. [Commencement of a Class Action]

One or more members of a class may sue or be sued as representative parties on behalf of all in a class action if:

(1) the class is so numerous or so constituted that joinder of all members, whether or not otherwise required or permitted, is impracticable; and

(2) there is a question of law or fact common to the class.

Comment

This section sets forth the requirements that must be satisfied if a class action is to be brought. Section 2 authorizes the certification of a class action.

Section 2. [Certification of Class Action]

(a) Unless deferred by the court, as soon as practicable after the commencement of a class action the court shall hold a hearing and determine whether or not the action is to be maintained as a class action and by order certify or refuse to certify it as a class action.

(b) The court may certify an action as a class action, if it finds that (1) the requirements of Section 1 have been satisfied, (2) a class action should be permitted for the fair and efficient adjudication of the controversy, and (3) the representative parties fairly and adequately will protect the interests of the class.

(c) If appropriate, the court may (1) certify an action as a class action with respect to a particualr claim or issue, (2) certify an action as a class action to obtain one or more forms of relief, equitable, declaratory, or monetary, or (3) divide a class into subclasses and treat each subclass as a class.

Comment

The standard established under 2(b)(2) is elaborated in Section 3(a) and that established under 2(b)(3) is elaborated in Section 3(b).

Section 3. [Criteria Considered]

(a) In determining whether the class action should be permitted for the fair and efficient adjudication of the controversy, as appropriately limited under Section 2(c), the court shall consider, and give appropriate weight to, the following and other relevant factors:

(1) whether a joint or common interest exists among members of the class;

(2) whether the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the

class that would establish incompatible standards of conduct for a party opposing the class;

(3) whether adjudications with respect to individual members of the class as a practical matter would be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interests.

(4) whether a party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief or corresponding declaratory relief appropriate with respect to the class as a whole;

(5) whether common questions of law or fact predominate over any questions affecting only individual members;

(6) whether other means of adjudicating the claims and defenses are impracticable or inefficient;

(7) whether a class action offers the most appropriate means of adjudicating the claims and defenses;

(8) whether members not representative parties have a substantial interest in individually controlling the prosecution or defense of separate actions;

(9) whether the class action involves a claim that is or has been the subject of a class action, a government action, or other proceeding;

(10) whether it is desirable to bring the class action in another forum;

(11) whether management of the class action poses unusual difficulties;

(12) whether any conflict of laws issues involved pose unusual difficulties; and

(13) whether the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class.

(b) In determining under Section 2(b) that the representative parties fairly and adequately will protect the interests of the class, the court must find that:

(1) the attorney for the representative parties will adequately represent the interests of the class;

(2) the representative parties do not have a conflict of interest in the maintenance of the class action; and

(3) the representative parties have or can acquire adequate finan-

cial resorces, considering Section 17, to assure that the interests of the class will not be harmed.

Comment

The factors listed in Section 3(a)(1) to (13), possibly along with other factors, are to be considered by the court in determining whether to certify the action as a class action. The factors may be given different weight by the court.

After an action has been brought as a class action, if the court determines that there is pending in another court an action which encompasses the action pending both as to general class and claim, it may refuse under Subsection 3(a)(9) and (10) to certify the action against or on behalf of the class if it concludes that this forum is not the most appropriate one. The court in making this decision should consider the sequence of the suits, the residence of the members of the class, where the transaction or occurrence involved took place, where the relevant evidence is available, and other pertinent facts.

Section 4. [Order on Certification]

(a) The order of certification shall describe the class and state: (1) the relief sought, (2) whether the action is maintained with respect to particular claims or issues, and (3) whether subclasses have been created.

(b) The order certifying or refusing to certify a class action shall state the reasons for the court's ruling and its findings on the facts listed in Section 3(a).

(c) An order certifying or refusing to certify an action as a class action is appealable.

(d) Refusal of certification does not terminate the action, but does preclude it from being maintained as a class action.

Comment

If class certification is denied, subsection (d) presupposes the existence of rules of civil procedure which will allow the action to continue with the representative parties as properly joined parties.

Denial of certification and the allowance of a personal action under subsection (d) does not affect any possible intervention or joinder of class members who are not representative parties under the applicable state laws.

Section 5. [Amendment of Certification Order]

(a) The court may amend the certification order at any time before entry of judgment on the merits. The amendment may (1) establish subclasses, (2) eliminate from the class any class member who was included in the class as certified, (3) provide for an adjudication limited to certain claims or issues, (4) change the relief sought, or (5) make any other appropriate change in the order.

(b) If notice of certification has been given pursuant to Section 7, the court may order notice of the amendment of the certification order to be given in terms and to any members of the class the court directs.

(c) The reasons for the court's ruling shall be set forth in the amendment of the certification order.

(d) An order amending the certification order is appealable. An order denying the motion of a member of a defendant class, not a representative party, to amend the certification order is appealable if the court certifies it for immediate appeal.

Comment

An order amending an order of certification is an appealable order as is an order certifying or refusing to certify an action as a class action.

A member of a defendant class can attempt to get out of a class action by seeking an amendment of the order of certification. If a member of a defendant class seeks an amendment which would delete him or her from the class and the court refused to make such an order, an appeal can be taken if the court certifies it for appeal.

Under Section 5(b) the court may order notice given of an amendment if it deems it desirable in light of the nature of the amendment and the notice previously given.

Section 6. [Reserved]

Comment

The section is reserved for provisions that may be added to govern jurisdiction of the person over class members who are non-residents or lack traditional minimum contacts with the state. See Phillips Petroleum Company v. Shutts, 472 U.S. ____, 86 L.Ed.2d 628 (1985), rendering obsolete the jurisdictional limitations of this Section as contained in the 1976 version.

Section 7. [Notice of Action]

(a) Following certification, the court by order, after hearing, shall direct the giving of notice to the class.

(b) The notice, based on the certification order and any amendment of the order, shall include:

(1) a general description of the action, including the relief sought, and the names and addresses of the representative parties;

(2) a statement of the right of a member of the class under Section 8 to be excluded from the action by filing an election to be excluded, in the manner specified, by a certain date;

(3) a description of possible financial consequences on the class;

(4) a general description of any counterclaim being asserted by or against the class, including the relief sought;

(5) a statement that the judgment, whether favorable or not, will bind all members of the class who are not excluded from the action;

(6) a statement that any member of the class may enter an appearance either personally or through counsel;

(7) an address to which inquiries may be directed; and

(8) other information the court deems appropriate.

(c) The order shall prescribe the manner of notification to be used and specify the members of the class to be notified. In determining the manner and form of the notice to be given, the court shall consider the interests of the class, the relief requested, the cost of notifying the members of the class, and the possible prejudice to members who do not receive notice.

(d) Each member of the class, not a representative party, whose potential monetary recovery or liability is estimated to exceed $100 shall be given personal or mailed notice if his identity and whereabouts can be ascertained by the exercise of reasonable diligence.

(e) For members of the class not given personal or mailed notice under subsection (d), the court shall provide, as a minimum, a means of notice reasonably calculated to apprise the members of the class of the pendency of the action. Techniques calculated to assure effective communication of information concerning commencement of the action shall be used. The techniques may include personal or mailed notice, notification by means of newspaper, television, radio, posting in public or other places, and distribution through trade, union, public interest, or other appropriate groups.

(f) The plaintiff shall advance the expense of notice under this sec-

tion if there is no counterclaim asserted. If a counterclaim is asserted the expense of notice shall be allocated as the court orders in the interest of justice.

(g) The court may order that steps be taken to minimize the expense of notice.

Comment

The hearing required by subsection (a) can be combined with the hearing required by Section 2(a).

Personal mailed notice to all members of the class is not required by this Act. For consideration of the notice required by the U.S. Constitution, see Gant v. City of Lincoln, 225 N.W.2d 549 (Neb.1975), and Cartt v. Superior Court in and for County of Los Angeles, 50 Cal.App.3d 960, 124 Cal.Rptr. 376 (Ct.App.1975).

The notice to be given may vary as to the persons to be notified and the form of notice and, to some extent, the content. Subsection (c) indicates that the court must consider a number of factors in deciding what type of notice to give.

Subsection (g) allows the court to order a defendant who has a mailing list of class members to co-operate with the representative parties in notifying the class members. Use of a computer or enclosing notice in a regular mailing would be possibilities.

Section 8. [Exclusion]

(a) A member of a plaintiff class may elect to be excluded from the action unless (1) he is a representative party, (2) the certification order contains an affirmative finding under paragraph (1), (2), or (3) of Section 3(a), or (3) a counterclaim under Section 11 is pending against the members or his class or subclass.

(b) Any member of a plaintiff class entitled to be excluded under subsection (a) who files an election to be excluded, in the manner and in the time specified in the notice, is excluded from and not bound by the judgment in the class action.

(c) The elections shall be [docketed] [made a part of the record] in the action.

(d) A member of a defendant class may not elect to be excluded.

Comment

Under some circumstances members of a plaintiff class cannot elect to be excluded because they are indispensable parties. This

would be determined by the court in ruling on certification considering the criteria of Section 3(a). Such situations might arise in actions comparable to those under Federal Rule 23(b)(1); see 3B, Moore's Federal Practice, ¶23.35. In most situations members of a plaintiff class will be permitted to elect to be excluded.

A class member aggrieved by an affirmative finding under Section 3(a) (1), (2) or (3) might seek relief through one of the extraordinary writs or through an interlocutory appeal if authorized by the state practice.

Section 9. [Conduct of Action]

(a) The court on motion of party or its own motion may make or amend any appropriate order dealing with the conduct of the action including, but not limited to, the following: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given as the court directs, of (i) any step in the action, (ii) the proposed extent of the judgment, or (iii) the opportunity of members to signify whether they consider the representation fair and adequate, to enter an appearance and present claims or defenses, or otherwise participate in the action; (3) imposing conditions on the representative parties or on intervenors; (4) inviting the attorney general to participate with respect to the question of adequacy of class representation; (5) making any other order to assure that the class action proceeds only with adequate class representation; and (6) making any order to assure that the class action proceeds only with competent representation by the attorney for the class.

(b) A class member not a representative party may appear and be represented by separate counsel.

Comment

The rules governing civil procedure in the courts of the state normally will govern procedures in class actions. Section 9 covers certain matters which deserve special consideration. Section 9(a)(4) does not limit the power of the attorney general to participate in litigation under other applicable provisions.

Section 10. [Discovery by or against Class Members]

(a) Discovery under [applicable discovery rules] may be used only on order of the court against a member of the class who is not a representative party or who has not appeared. In deciding whether discovery should be allowed the court shall consider, among other relevant factors, the timing of the request, the subject matter to be covered, whether representatives of the class are seeking discovery on the subject to be covered, and whether the discovery will result in annoyance, oppression, or undue burden or expense for the member of the class.

(b) Discovery by or against representative parties or those appearing is governed by the rules dealing with discovery by or against a party to a civil action.

Comment

Under Section 10 members of the class not representative parties and not appearing are not treated as parties to the litigation for discovery purposes. Discovery can be obtained of these members only on order of court.

Discovery against representative parties may include the representative parties' fee arrangement with counsel. Disclosure of this arrangement is required under Section 17.

Section 11. [Counterclaims]

(a) A defendant in an action brought by a class may plead as a counterclaim any claim the court certifies as a class action against the plaintiff class. On leave of court, the defendant may plead as a counterclaim a claim against a member of the class or a claim the court certifies as a class action against a subclass.

(b) Any counterclaim in an action brought by a plaintiff class must be asserted before notice is given under Section 7.

(c) If a judgment for money is recovered against a party on behalf of a class, the court rendering judgment may stay distribution of any award or execution of any portion of a judgment allocated to a member of the class against whom the losing party has pending an action in or out of state for a judgment for money, and continue the stay so long as the losing party in the class action pursues the pending action with reasonable diligence.

(d) A defendant class may plead as a counterclaim any claim on behalf of the class that the court certifies as a class action against

the plaintiff. The court may certify as a class action a counterclaim against the plaintiff on behalf of a subclass or permit a counteclaim by a member of the class. The court shall order that notice of the counterclaim by the class, subclass, or member of the class be given to the members of the class as the court directs, in the interest of justice.

(e) A member of a class or subclass asserting a counterclaim shall be treated as a member of a plaintiff class for the purpose of exclusion under Section 8.

(f) The court's refusal to allow, or the defendant's failure to plead, a claim as a counterclaim in a class action does not bar the defendant from asserting the claim in a subsequent action.

Comment

Nothing in this Act precludes a party opposing the class from bringing an action against a member of the class action or in the future. Subsection (f) makes the ordinary rules concerning compulsory counterclaims inapplicable in a class action under this Act.

The expense of notificaiton of actions involving counterclaims is to be determined as provided in Section 7(f).

Section 12. [Dismissal or Compromise]

(a) Unless certification has been refused under Section 2, a class action, without the approval of the court after hearing, may not be (1) dismissed voluntarily, (2) dismissed involuntarily without an adjudication on the merits, or (3) compromised.

(b) If the court has certified the action under Section 2, notice of hearing on the proposed dismissal or compromise shall be given to all members of the class in a manner the court directs. If the court has not ruled on certification, notice of hearing on the proposed dismissal or compromise may be ordered by the court which shall specify the persons to be notified and the manner in which notice is to be given.

(c) Notice given under subsection (b) shall include a full disclosure of the reasons for the dismissal or compromise including, but not limited to, (1) any payments made or to be made in connection with the dismissal or compromise, (2) the anticipated effect of the dismissal or compromise on the class members, (3) any agreement made in connection with the dismissal or compromise, (4) a description and evaluation of alternatives considered by the representative parties and (5) an explanation of any other circumstances giving rise to the pro-

posal. The notice also shall include a description of the procedure available for modification of the dismissal or compromise.

(d) On the hearing of the dismissal or compromise, the court may:

(1) as to the representative parties or a class certified under Section 2, permit dismissal with or without prejudice or approve the compromise;

(2) as to a class not certified, permit dismissal without prejudice;

(3) deny the dismissal;

(4) disapprove the compromise; or

(5) take other appropriate action for the protection of the class and in the interest of justice.

(e) The cost of notice given under subsection (b) shall be paid by the party seeking dismissal, or as agreed in case of a compromise, unless the court after hearing orders otherwise.

Comment

This section covers class actions brought under Section 1 until certification has been refused under Section 2, as well as class actions certified under Section 2.

Section 13. [Effect of Judgment on Class]

In a class action certified under Section 2 in which notice has been given under Section 7 or 12, a judgment as to the claim or particular claim or issue certified is binding, according to its terms, on any member of the class who has not filed an election of exclusion under Section 8. The judgment shall name or describe the members of the class who are bound by its terms.

Comment

Section 13 deals with the application of a class action judgment to the members of the class. This Act does not deal with the preclusive effect of a class action upon a member of the class who has requested exclusion. This is a matter which is governed by the normal rules of res judicata/preclusion.

Section 14. [Costs]

(a) Only the representative parties and those members of the class who have appeared individually are liable for costs assessed against a plaintiff class.

(b) The court shall apportion the liability for costs assessed against a defendant class.

(c) Expenses of notice advanced under Section 7 are taxable as costs in favor of the prevailing party.

Comment

Section 14 specifies the liability of class members when costs are assessed against the class and provides for assessment of the expense of notification under Section 7.

The nature of other costs and assessments against parties in a class action is left to the law generally applicable in the state.

Section 15. [Relief Afforded]

(a) The court may award any form of relief consistent with the certification order to which the party in whose favor it is rendered is entitled including equitable, declaratory, monetary, or other relief to individual members of the class or the class in a lump sum or installments.

(b) Damages fixed by a minimum measure of recovery provided by any statute may not be recovered in a class action.

(c) If a class is awarded a judgment for money, the distribution shall be determined as follows:

(1) The parties shall list as expeditiously as possible all members of the class whose identity can be determined without expending a disproportionate share of the recovery.

(2) The reasonable expense of identification and distribution shall be paid, with the court's approval, from the funds to be distributed.

(3) The court may order steps taken to minimize the expense of identification.

(4) The court shall supervise, and may grant or stay the whole or any portion of, the execution of the judgment and the collection and distribution of funds to the members of the class as their interests warrant.

(5) The court shall determine what amount of the funds available for the payment of the judgment cannot be distributed to members of the class individually because they could not be identified or located or because they did not claim or prove the right to money apportioned to them. The court after hearing shall distribute that

amount, in whole or in part, to one or more states as unclaimed property or to the defendant.

(6) In determining the amount, if any, to be distributed to a state or to the defendant, the court shall consider the following criteria: (i) any unjust enrichment of the defendant; (ii) the willfulness or lack of willfulness on the part of the defendant; (iii) the impact on the defendant of the relief granted; (iv) the pendency of other claims against the defendant; (v) any criminal sanction imposed on the defendant; and (vi) the loss suffered by the plaintiff class.

(7) The court, in order to remedy or alleviate any harm done, may impose conditions on the defendant respecting the use of the money distributed to him.

(8) Any amount to be distributed to a state shall be distributed as unclaimed property to any state in which are located the last known addresses of the members of the class to whom distribution could not be made. If the last known addresses cannot be ascertained with reasonable diligence, the court may determine by other means what portion of the unidentified or unlocated members of the class were residents of a state. A state shall receive that portion of the distribution that its residents would have received had they been identified and located. Before entering an order distributing any part of the amount to a state, the court shall give written notice of its intention to make distribution to the attorney general of the state of the residence of any person given notice under Section 7 or 12 and shall afford the attorney general an opportunity to move for an order requiring payment to the state.

Comment

Subsection (c)(3) is similar to subsection 7(g) in its purpose and scope and should be construed similarly.

Subsection 15(c)(5) provides for the possibility of escheat of funds available for the payment of the judgment if the court, applying the relevant criteria, so orders. The escheat provision is similar to that found in the Model Escheat of Postal Savings System Accounts Act.

If the court decides that undistributed funds available for the payment of the judgment should be distributed to the defendant, the court under subsection 15(c)(7), "in order to remedy or alleviate any harm done, may impose conditions on the defendant respecting the use of the money distributed to him." For example, if the plaintiff class sued for damage done because of the discharge of pollutants by the defendant and the class won a money judgment, the court might dis-

tribute to the defendant funds undistributed to the plaintiff class on condition that the defendant use the funds to install pollution-control devices.

Section 16. [Attorney's Fees]

(a) Attorney's fees for representing a class are subject to control of the court.

(b) If under an applicable provision of law a defendant or defendant class is entitled to attorney's fees from a plaintiff class, only representative parties and those members of the class who have appeared individually are liable for those fees. If a plaintiff is entitled to attorney's fees from a defendant class, the court may apportion the fees among the members of the class.

(c) If a prevailing class recovers a judgment for money or other award that can be divided for the purpose, the court may order reasonable attorney's fees and litigation expenses of the class to be paid from the recovery.

(d) If the prevailing class is entitled to declaratory or equitable relief, the court may order the adverse party to pay to the class its reasonable attorney's fees and litigation expenses if permitted by law in similar cases not involving a class or the court finds that the judgment has vindicated an important public interest. However, if any monetary award is also recovered, the court may allow reasonable attorney's fees and litigation expenses only to the extent that a reasonable proportion of that award is insufficient to defray the fees and expenses.

(e) In determining the amount of attorney's fees for a prevailing class the court shall consider the following factors:

(1) the time and effort expended by the attorney in the litigation, including the nature, extent, and quality of the services rendered;

(2) results achieved and benefits conferred upon the class;

(3) the magnitude, complexity, and uniqueness of the litigation;

(4) the contingent nature of success;

(5) in cases awarding attorney's fees and litigation expenses under subsection (d) because of the vindication of an important public interest, the economic impact on the party against whom the award is made; and

(6) appropriate criteria in the [state's Code of Professional Responsibility].

Comment

Most of the factors listed in subsection (e) are taken from Lindy Bros. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973).

Section 17. [Arrangements for Attorney's Fees and Expenses]

(a) Before a hearing under Section 2(a) or at any other time the court directs, the representative parties and the attorney for the representative parties shall file with the court, jointly or separately: (1) a statement showing any amount paid or promised them by any person for the services rendered or to be rendered in connection with the action or for the costs and expenses of the litigation and the source of all of the amounts; (2) a copy of any written agreement, or a summary of any oral agreement, between the representative parties and their attorney concerning financial arrangements or fees and (3) a copy of any written agreement, or a summary of any oral agreement, by the representative parties or the attorney to share these amounts with any person other than a member, regular associate, or an attorney regularly of counsel with his law firm. This statement shall be supplemented promptly if additional arrangements are made.

(b) Upon a determination that the costs and litigation expenses of the action cannot reasonably and fairly be defrayed by the representative parties or by other available sources, the court by order may authorize and control the solicitation and expenditure of voluntary contributions for this purpose from members of the class, advances by the attorneys or others, or both, subject to reimbursement from any recovery obtained for the class. The court may order any available funds so contributed or advanced to be applied to the payment of any costs taxed in favor of a party opposing the class.

Comment

Section 17 requires this information to be disclosed in order to assist the court in making determinations concerning (1) adequacy of representation by the representative parties and by the attorney for the class, (2) any possible collusion between the representative parties and the attorney for the class, and (3) any possible conflict of interests among the representative parties and the class members.

This section is grounded on the idea that representative parties are fiduciaries for the class and that class actions are unique and require treatment different from ordinary actions.

If the information available under this section shows that an action has been improvidently brought, action can then be taken under Section 9(a)(5) or (6).

Section 18. [Statute of Limitations]

The statute of limitations is tolled for all class members upon the commencement of an action asserting a class action. The statute of limitations resumes running against a member of a class:

(1) upon his filing an election of exclusion;

(2) upon entry of an order of certification, or of an amendment thereof, eliminating him from the class;

(3) except as to representative parties, upon entry of an order under Section 2 refusing to certify the action as a class action; and

(4) upon dismissal of the action without an adjudication on the merits.

Comment

Section 18 adopts the principles of American Pipe and Construction Co. v. Utah, 415 U.S. 952, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), which held that the commencement of a class action under Federal Rule 23 suspends the applicable statute of limitation to all members of the class pending a determination of class action status.

Section 19. [Short Title]

This [Act] [Rule] may be cited as the "Uniform Commissioners' Model Class Actions [Act] [Rule]."

Comment

With the deletion of the jurisdictional and reciprocal provisions of former Section 6, the need for uniformity is diminished, and the Act or Rule is therefore re-titled as "Model."

Section 20. [Repeal]

The following acts and parts of acts are repealed:

Section 21. [Time of Taking Effect]

This [Act] [Rule] shall take effect ____.

997. Any matter respecting the recovery of a small claim is not subject to article 846 of this Code.

1971, c. 86, s. 1.

997.1. The third paragraph of article 955 applies notwithstanding the Charter of human rights and freedoms (chapter C-12).

1977, c. 73, s. 43.

998. In applying this book, the court may hold its sittings even on a non-juridical day and as often as necessary, at a time fixed by the judge.

1971, c. 86, s. 1.

BOOK IX

CLASS ACTION

TITLE I

INTRODUCTORY PROVISIONS

999. In this book, unless the context indicates a different meaning,

(*a*) "judgment" means a judgment of the court;

(*b*) "final judgment" means the judgment which decides the questions of law or fact dealt with collectively;

(*c*) "member" means a natural person who is part of a group on behalf of which a natural person brings or intends to bring a class action;

(*d*) "class action" means the procedure which enables one member to sue without a mandate on behalf of all the members.

1978, c. 8, s. 3.

1000. The Superior Court hears exclusively, in first instance, suits brought under this book.

1978, c. 8, s. 3.

1001. Unless the chief justice decides otherwise, the same judge designated by him hears the entire proceedings relating to the same class action.

Where the chief justice considers that the interest of justice so requires, he may designate such judge notwithstanding articles 234 and 235.

1978, c. 8, s. 3.

TITLE II

AUTHORIZATION TO INSTITUTE A CLASS ACTION

1002. A member cannot institute a class action except with the prior authorization of the court, obtained on a motion.

The motion states the facts giving rise thereto, indicates the nature of the recourses for which authorization is applied for, and describes the group on behalf of which the member intends to act; the allegations of the motion are supported by an affidavit. It is accompanied with a notice of at least ten days of the date of presentation and is served on the person against whom the applicant intends to exercise the class action.

1978, c. 8, s. 3.

1003. The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:

(*a*) the recourses of the members raise identical, similar or related questions of law or fact;

(*b*) the facts alleged seem to justify the conclusions sought;

(*c*) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and

(*d*) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

1978, c. 8, s. 3.

1004. If the court grants the motion, it refers the record to the chief justice who, taking into account the interest of the parties and of the members, fixes the district in which the class action is brought.

1978, c. 8, s. 3.

1005. The judgment granting the motion:

(*a*) describes the group whose members will be bound by any judgment;

(*b*) identifies the principal questions to be dealt with collectively and the related conclusions sought;

(*c*) orders the publication of a notice to the members.

The judgment also determines the date after which a member can no longer request his exclusion from the group; the delay for exclusion cannot be less than thirty days nor more than six months after the date of the notice to the members. Such delay is peremptory; the court may nevertheless permit the exclusion of a member who shows that in fact it was impossible for him to act sooner.

1978, c. 8, s. 3.

1006. The notice to the members indicates:

(*a*) the description of the group;

(*b*) the principal questions to be dealt with collectively and the related conclusions sought;

(*c*) the right of a member to intervene in the class action;

(*d*) the district in which the class action is to be brought;

(*e*) the right of a member to request his exclusion from the group, the formalities to be followed and the delay for requesting his exclusion;

(*f*) the fact that a member who is not a representative or an intervener cannot be called upon to pay the costs of the class action; and

(*g*) any other information the court deems it useful to include in the notice.

1978, c. 8, s. 3.

1007. A member may request his exclusion from the group by notifying the prothonotary of his decision, by registered or certified mail, before the expiry of the delay for exclusion.

A member who has requested his exclusion is not bound by any judgment on the demand of the representative.

1978, c. 8, s. 3.

1008. A member is deemed to have requested his exclusion from the group if he does not, before the expiry of the delay for exclusion, discontinue a suit he has brought which the final judgment on the demand of the representative would decide.

1978, c. 8, s. 3.

1009. In the case of an application for a declaratory judgment, the notice replaces, with respect to the members, the service provided for by article 454.

1978, c. 8, s. 3.

1010. The judgment dismissing the motion is subject to appeal *pleno jure* by the applicant or , by leave of a judge of the Court of Appeal, by a member of the group on behalf of which the motion had been presented. The appeal is heard and decided by preference.

The judgment granting the motion and authorizing the exercise of the recourse is without appeal.

1978, c. 8, s. 3; 1982, c. 37, s. 20.

1010.1. Unless inconsistent therewith, Title III applies, *mutatis mutandis*, to this title.

1982, c. 37, s. 21.

TITLE III

CONDUCT OF THE ACTION

1011. The representative brings his demand in accordance with the ordinary rules. If he does not do so within three months of the authorization, the court may declare it perempted upon motion by any interested party served on the representative and accompanied with a notice of at least thirty days of its presentation. The notice must also be published at least fifteen days before the date of presentation of the motion, in the same manner as the notice of the judgment granting the motion to authorize the bringing of the class action, unless the court orders another mode of publication.

So long as the motion is not decided, the representative or another member requesting to be substituted for him may still avoid the declaration of peremption of the authorization by bringing his demand; in such case, the court grants the motion, but for the costs only.

1978, c. 8, s. 3; 1982, c. 37, s. 22.

1012. Except in the case where he claims to have a recourse in warranty, the defendant cannot urge a preliminary exception against the representative unless it is common to a substantial part of the members and bears on a question dealt with collectively.

1978, c. 8, s. 3.

1013. Proof or hearing of the demand brought by the representative cannot take place before the expiry of the delay for exclusion.

1978, c. 8, s. 3.

1014. An admission by a representative binds the members unless the court considers that the admission causes them prejudice.

1978, c. 8, s. 3.

1015. The representative is deemed to have a sufficient interest notwithstanding his acceptance of the defendant's offers respecting

his personal claim. However, another member may request to be substituted for him.

1978, c. 8, s. 3.

1016. The representative cannot amend a proceeding, or discontinue, in whole or in part, the action, a proceeding or a judgment, without the permission of the court and except on the conditions it deems necessary.

1978, c. 8, s. 3.

1017. A member cannot intervene voluntarily in demand except to assist the representative, to aid his demand or to support his pretensions.

The court admits the intervention if of opinion that it is useful to the group.

1978, c. 8, s. 3.

1018. In the case of a conservatory intervention, the court may at any time limit the right of an intervener to produce a proceeding or to participate in the proof or hearing, if it is of opinion that the intervention is prejudicial to the conduct of the action or is contrary to the interests of the members.

1978, c. 8, s. 3.

1019. A party cannot, before the final judgment, submit a member other than a representative or an intervener to an examination on discovery or a medical examination unless the court considers the examination on discovery or medical examination useful to the adjudication of the questions of law or fact dealt with collectively.

1978, c. 8, s. 3.

1020. A witness cannot be heard out of court without the permission of the court.

1978, c. 8, s. 3.

1021. A member cannot be examined on articulated facts.

1978, c. 8, s. 3.

1022. The court may, at any time, upon the application of a party, revise the judgment authorizing the bringing of the class action if it considers that the conditions set forth in paragraph *a* or *c* of article 1003 are no longer met.

The court may then amend the judgment authorizing the bringing of the class action or annul it, or allow the representative to amend the conclusions sought.

In addition, if the circumstances so require, the court may, at any time, and even *ex officio*, change or divide the group.

1978, c. 8, s. 3.

1023. The person wishing to waive his status of representative can only do so with the authorization of the court.

The courts accepts the waiver if it is able to ascribe the status of representative to another member.

1978, c. 8, s. 3.

1024. A member may, by motion, apply to the court to have himself or another member substituted for the representative.

The court may substitute the applicant or another member consenting thereto for the representative if it is of opinion that the latter is no longer in a position to represent the members adequately.

The substituted representative accepts the trial at the stage it has then reached; he may, with the authorization of the court, refuse to ratify the proceedings already had if they have caused an irreparable prejudice to the members. He cannot be bound to pay the costs and other expenses for proceedings prior to the substitution, unless the court orders otherwise.

1978, c. 8, s. 3.

1025. Transaction, acceptance of a tender or acquiescence, except where it is unconditional in the whole of the demand, is valid only if approved by the court. This approval cannot be given unless a notice has been given to the members.

The judgment determines, is such is the case, the terms and conditions of application of articles 1029 to 1040.

1978, c. 8, s. 3; 1982, c. 17, s. 30.

1026. If, after the demand of the representative is brought, the court annuls the judgment authorizing the bringing of the class action, the suit continues between the parties in accordance with the

ordinary rules; where such is the case, the record is returned to the competent court.

1978, c. 8, s. 3.

TITLE IV

JUDGMENT

CHAPTER I

CONTENT AND EFFECT OF THE FINAL JUDGMENT

1027. Every final judgment describes the group and binds the member who has not requested his exclusion from the group.

1978, c. 8, s. 3.

1028. Every final judgment condemning to damages or to the reimbursement of an amount of money orders that the claims of the members be recovered collectively or be the object of individual claims.

1978, c. 8, s. 3.

1029. The court may, *ex officio* or upon application of the parties, provide measures designed to simplify the execution of the final judgment.

1978, c. 8, s. 3.

1030. When the final judgment acquires the authority of *res judicata*, the court of first instance orders the publication of a notice.

The notice contains a description of the group and indicates the tenor of the judgment.

If the final judgment provides that a member may file his claim, the notice also indicates the questions remaining to be determined, the information and documents that must accompany the claim and any other information the court deems it useful to include in the notice.

1978, c. 8, s. 3.

CHAPTER II

COLLECTIVE RECOVERY

1031. The court orders collective recovery if the evidence produced enables the establishment with sufficient accuracy of the total amount of the claims of the members; it then determines the amount owed by the debtor even if the identity of each of the members or the exact amount of their claims is not established.

1978, c. 8, s. 3.

1032. The judgment ordering the collective recovery of the claims orders the debtor either to deposit the established amount in the office of the court or to carry out a reparatory measure that it determines or to deposit a part of the established amount and to carry out a reparatory measure that it deems appropriate.

The judgment may also, for the reasons indicated therein, fix terms and conditions of payment.

The prothonotary acts as seizing officer on behalf of the members.

1978, c. 8, s. 3.

1033. If the judgment ordering collective recovery provides for the individual liquidation of the claims of the members or the distribution of an amount to each of them, this liquidation or distribution is effected in the manner provided in articles 1037 to 1040.

Amounts not claimed or not distributed constitute the balance.

1978, c. 8, s. 3.

1034. The court may, if of opinion that the liquidation of individual claims or the distribution of an amount to each of the members is impossible or too expensive, refuse to proceed with it and provide for the distribution of the balance of the amounts recovered collectively after collocating the law costs and the fees of the representative's attorney.

1978, c. 8, s. 3.

1035. The claims are collocated in the following order:

(1) law costs, including the costs of notification;

(2) the fees of the representative's attorney; and

(3) the claims of the members, if any.

1978, c. 8, s. 3.

1036. The court disposes of the balance in the manner it determines, taking particular account of the interest of the members, after giving the parties and any other person it designates an opportunity to be heard.

1978, c. 8, s. 3.

CHAPTER III

INDIVIDUAL CLAIMS

1037. This chapter applies where it is expedient to render judgment upon the individual claims of the members.

1978, c. 8, s. 3.

1038. When the final judgment acquires the authority of *res judicata*, a member may, within one year following the publication of the notice provided for in article 1030, file his claim at the office of the court of the district in which the class action was heard or of any other district as determined by the court.

1978, c. 8, s. 3.

1039. The court decides the claim of the member or orders the prothonotary to render judgment in accordance with the terms and conditions it determines.

The court may, if it deems it necessary in the interest of justice and of the parties, determine special modes of proof and procedure.

1978, c. 8, s. 3.

1040. The defendant may urge a preliminary exception against a claimant which article 1012 prevented him from moving earlier.

1978, c. 8, s. 3.

CHAPTER IV

APPEAL

1041. The final judgment is subject to appeal *pleno jure* by a party.

1978, c. 8, s. 3.

1042. If the representative does not appeal or if his appeal is dismissed for one of the reasons provided for in paragraph 1 or 3 of the first paragraph of article 501, a member may, within sixty days following the date of the publication of the notice contemplated in article 1030, apply to the Court of Appeal for leave to appeal and to be substituted for the representative. The Court grants the motion if it is of opinion that the interest of the members so requires.

The delay provided for in this article is peremptory.

1978, c. 8, s. 3.

1043. The appealing party addresses the court of first instance for determination of the notice to be given to the members.

1978, c. 8, s. 3.

1044. If the Court of Appeal, in opposition to the Superior Court, maintains the demand of the representative, in whole or in part, it may order the record of the action returned to the court of first instance so that collective recovery may be proceeded with or judgment may be rendered on the individual claims of the members.

1978, c. 8, s. 3.

TITLE V

MISCELLANEOUS PROVISIONS

1045. The court may, at any stage of the proceedings in a class action, prescribe measures designed to hasten their progress and to simplify the proof, if they do not prejudice a party or the members; it may also order the publication of a notice to the members when it considers it necessary for the preservation of their rights.

1978, c. 8, s. 3.

1046. When the court orders the publication of a notice, it determines the date, form and mode of such publication; where such is the case, it indicates, by naming or describing them, those members who will be notified individually. The notice indicates the description of the group and the names and addresses of the parties.

Except in the cases contemplated in articles 1006 and 1030, the court also prescribes the information contained in the notice.

1978, c. 8, s. 3.

1047. Where the Cities and Towns Act (chapter C-19), the Municipal Code (chapter C-27.1) or a municipal charter provides for the sending of a notice of claim as a precondition to the exercise of a recourse, the notice given by a member is valid for all the members of the group and the insufficiency of the notice cannot be urged against the representative.

1978, c. 8, s. 3.

1048. A corporation governed by Part III of the Companies Act (chapter C-38), a cooperative governed by the Cooperatives Act (chapter C-67.2) or a group contemplated in the second paragraph of section 60, may apply for the status of representative, if:

(*a*) one of its members designated by it is a member of the group on behalf of which it intends to bring a class action; and

(*b*) the interest of that member is linked to the objects for which the corporation, the association or the group has been incorporated or formed.

The affidavit required in support of the motion for authorization is then signed by the member designated under subparagraph *a* of the first paragraph.

1978, c. 8, s. 3; 1982, c. 37, s. 23; 1982, c. 26, s. 290.

1049. The representative or member who applies to act as such must be represented by an attorney.

1978, c. 8, s. 3.

1050. For the application of this book, except articles 1002 to 1006, the holder of parental authority may act *ex officio* as tutor to a minor child who does not have a tutor.

1978, c. 8, s. 3.

1050.1. In the case of a condemnation to pay the costs, the judicial fees are computed as in the case of an action of class II-A in the Tariff of judicial fees passed under subsection 2 of section 125 of the Act respecting the Barreau du Québec (chapter B-1) and, in the computation, section 23 of the tariff does not apply.

No special fee provided for in the tariff to take the importance of a case into account may be granted except on a motion of the attorney served on the adverse party and on the Fonds d'aide au recours collectif if he has complied with the obligation provided in the first paragraph of section 32 of the Act respecting the class action (chapter R-2.1); the court shall not then take into account the fact

that the Fonds d'aide au recours collectif has guaranteed all or part of the expenses.

1982, c. 37, s. 24.

1051. The provisions of the other books of this Code that are inconsistent with this book, particularly the second paragraph of article 172 and articles 270 to 272 and 382 to 394, do not apply to suits for the purposes of which the class action is brought.

1978, c. 8, s. 3.

1052. *(This article ceased to have effect on 17 April 1987).*

1982, c. 21, s. 1; U. K., 1982, c. 11, Sch. B, Part I, s. 33.

Articles 35, 36, 629 and 696 of this Code will be amended on 1 July 1989, the date of the coming into force of sections 553, 554 and 701 of chapter 84 of the statutes of 1988.

Article 60 of this Code will be amended upon the coming into force of section 56 of chapter 85 of the statutes of 1987 on the date fixed by order of the Government.

Articles 149, 185 and 523 of this Code will be amended upon the coming into force of sections 7, 8 and 11 of chapter 29 of the statutes of 1985 on the date or dates fixed by order of the Government.

Articles 553.9 and 989 of this Code will be amended upon the coming into force of sections 108 and 109 of chapter 51 of the statutes of 1988 on the date or dates fixed by order of the Government.

Articles 641.1, 641.2, 659.5, 659.6, 659.7 and 662 of this Code will be amended upon the coming into force of sections 3, 4, 6 to 8 and 10 of chapter 56 of the statutes of 1988 on the date or dates fixed by order of the Government.

Articles 659.1 to 659.4 and 661.1 of this Code will be repealed upon the coming into force of sections 5 and 9 of chapter 56 of the statutes of 1988 on the date or dates fixed by order of the Government.

Any provisions referred to in this Code as "not in force" will come into force on the date or dates fixed by order of the Government (1982, c. 17, s. 87; 1985, c. 29, s. 50; 1988, c. 56, s. 13).

Chapter R-2.1

AN ACT RESPECTING THE CLASS ACTION

TITLE I
CLASS ACTION

1. Amendment integrated into c. C-25, a. 34.

1978, c. 8, s. 1.

2. Amendment integrated into c. C-25, a. 954.

1978, c. 8, s. 2.

3. Amendment integrated into c. C-25, aa. 999-1051.

1978, c. 8, s. 3.

4. Amendment integrated into c. C-25, Book X.

1978, c. 8, s. 4.

TITLE II
ASSISTANCE TO CLASS ACTIONS

CHAPTER I
DEFINITIONS

Interpretation:

5. In this title, unless the context indicates a different meaning,

"assistance"; (*a*) "assistance" means the assistance granted under Chapter III of this title;

"recipient"; (*b*) "recipient" means the person who receives assistance;

"Fonds"; (*c*) "Fonds" means the Fonds d'aide aux recours collectifs established by section 6;

"representative"; (*d*) "representative" means the person who is ascribed the status of representative for the bringing of a class action, in accordance with article 1003 of the Code of Civil Procedure;

"*applicant*". (*e*) "applicant" means a person who applies for assistance.

1978, c. 8, s. 5.

CHAPTER II

THE FONDS

Name. **6.** An agency is established under the name of "Fonds d'aide aux recours collectifs".

Powers of a corporation. The Fonds is a corporation within the meaning of the Civil Code and has the general powers of such a corporation and the special powers conferred upon it by this act.

1978, c. 8, s. 6.

Object. **7.** The object of the Fonds is to ensure the financing of class actions in the manner provided for by this title and to disseminate information respecting the exercise of such actions.

1978, c. 8, s. 7; 1984, c. 46, s. 31.

Administration. **8.** The Fonds shall be administered by three persons including a president, appointed for not more than three years by the Government, after consultation with the Barreau du Québec and the Commission des services juridiques.

Salary, fees. The Government shall fix, where necessary, the salary, additional salary or fees that may be paid to each of the administrators, and their allowances or indemnities.

1978, c. 8, s. 8.

Administrator to remain in office. **9.** An administrator shall remain in office on the expiry of his term until he is reappointed or replaced.

1978, c. 8, s. 9.

Inability to act. **10.** If an administrator is unable to act by reason of absence or illness, the Government may appoint a person to replace him temporarily.

1978, c. 8, s. 10.

Head office. **11.** The Fonds shall have its head office at the place determined by the Government; a notice of the location or of any change of location of the head office shall be published in the *Gazette officielle du Québec*.

Sittings.

The Fonds may hold its sittings anywhere in Québec.

1978, c. 8, s. 11.

Quorum.

12. Two members constitute a quorum of the Fonds. In the case of a tie-vote, the president has a casting vote.

Personal interest.

An administrator having a personal interest related to an application for assistance must declare his interest and must abstain from participating in the decision, under pain of forfeiture of office.

Participation in decision.

However, if such an interest results solely from the fact that the administrator is a member of the group on behalf of which an application for assistance is made to the Fonds, the administrator shall participate in the decision but must declare his interest.

1978, c. 8, s. 12.

Appointment and remuneration.

13. The secretary and the other officers of the Fonds are appointed and remunerated in accordance with the Public Service Act (chapter F-3.1.1).

1978, c. 8, s. 13; 1986, c. 61, s. 37.

Minutes, copies and extracts.

14. Minutes of the sittings of the Fonds approved by the administrators are authentic; the same applies to copies or extracts certified by the president or the secretary.

1978, c. 8, s. 14.

Fiscal year.

15. The fiscal year of the Fonds ends on 31 March each year.

1978, c. 8, s. 15.

Budget.

16. Not later than 1 September each year, the Fonds shall send its budget to the Minister of Justice for the ensuing fiscal year. Such budget shall be without effect so long as it has not been approved by the Minister.

Administrator dismissed.

The Government may dismiss any administrator of the Fonds who acquiesces to an expenditure not provided for by the budget of the Fonds, except an expenditure not exceeding the revenues of the Fonds not provided for in the budget.

1978, c. 8, s. 16.

Annual report.

17. The Fonds shall send to the Minister of Justice, not later than 30 June each year, a report of its activities for the previous fiscal year.

Tabling

The Minister shall table such report before the Assemblée nationale if it is in session, or, if it is not in session, within thirty days from the opening of the next session or resumption, as the case may be.

1978, c. 8, s. 17.

Information and report.

18. The Fonds shall at any time give to the Minister of Justice any information or report he requires on its activities.

1978, c. 8, s. 18.

Audit of books and accounts.

19. The Auditor-General shall, each year and, in addition, whenever the Gouvernement so orders, audit the books and accounts of the Fonds.

1978, c. 8, s. 19.

CHAPTER III

ASSISTANCE

DIVISION I

GRANTING ASSISTANCE

Application in writing.

20. Every representative and every person intending to be ascribed such status may apply in writing for assistance from the Fonds.

1978, c. 8, s. 20.

Content.

21. The applicant shall set forth in his application the basis of his claim and the essential facts determining its exercise, and shall describe the group on behalf of which he intends to bring or is bringing the class action.

Content.

He shall also state his financial condition and that of the members of the group who have made themselves known; he shall indicate the purposes for which the assistance is intended to be used, the amount required, and any other revenue or service available to him.

1978, c. 8, s. 21.

Affidavit.

22. The applicant shall certify in his application that the information supplied by him is accurate, and he shall authorize the Fonds to verify the accuracy thereof.

Vouchers and other information.

He shall furnish the vouchers and other information the Fonds requires.

1978, c. 8, s. 22.

Power of the Fonds

23. The Fonds shall study the applicant's application and it may, for that purpose, hear the applicant or his attorney.

Criteria for granting assistance.

In order to determine whether to grant assistance, the Fonds shall assess whether the class action may be brought or continued without such assistance; in addition, if the status of representative has not yet been ascribed to the applicant, the Fonds shall consider the probable existence of the right he intends to assert and the probability that the class action will be brought.

Decision.

The Fonds may defer the study of a part of the application, refuse assistance or grant it, in whole or in part; in all cases, it shall render its decision within one month following receipt of the application.

1978, c. 8, s. 23.

Written notification.

24. If the Fonds defers the study of a part of the application or if it refuses to grant assistance, it shall notify the applicant in writing of its decision and indicate the reasons therefor.

1978, c. 8, s. 24.

Agreement between Fonds and recipient.

25. If assistance is granted, the Fonds shall agree upon the conditions with the applicant or his attorney.

The agreement between the Fonds and the recipient shall, in particular, provide for:

(*a*) the amount and use of the assistance;

(*b*) the advances that may be paid to the recipient;

(*c*) the terms and conditions of producing accounts and expenditures;

(*d*) the reports the recipient or his attorney must supply to the Fonds;

(*e*) the cases where assistance may be suspended or diminished;

(*f*) the terms and conditions of reimbursing the advances received or of assistance, if such is the case;

(*g*) the subrogation of the Fonds in the rights of the recipient or his attorney up to the amounts paid to them.

1978, c. 8, s. 25.

Temporary assistance.

26. An administrator of the Fonds may grant the applicant temporary assistance, which shall not exceed the amount prescribed by regulation of the Fonds, if he considers that immediate assistance

is necessary to avoid the loss or non-exercise of the applicant's right and if the Fonds cannot meet in time to decide the applicant's application. The decision of the administrator must be substantiated.

Reimbursement. The applicant must reimburse the amounts so received if the Fonds thereafter refuses to grant assistance.

1978, c. 8, s. 26.

DIVISION II

RIGHTS AND OBLIGATIONS OF THE FONDS AND OF THE RECIPIENT

Right of recipient. **27.** The recipient is entitled to the payment by the Fonds of the expenses expedient for the preparation or bringing of the class action in the manner provided for in the agreement contemplated in section 25.

1978, c. 8, s. 27.

Obligations of recipient. **28.** The recipient must notify the Fonds of any fact changing the information supplied in accordance with sections 21 and 22.

Obligations of recipient. He must also send to the Fonds a copy of the judgment of the court authorizing the bringing of the class action or terminating it, ordering the publication of a notice or of such a nature as to amend the agreement.

1978, c. 8, s. 28.

Obligations of the Fonds. **29.** The Fonds shall pay for the recipient in the manner provided for in the agreement contemplated in section 25, up to the amount of the assistance:

(*a*) the fees of the recipient's attorney;

(*b*) the fees and costs of experts and advocates-counsel acting for the recipient;

(*c*) the costs and other court expenditures including costs of notification, if they are at the expense of the recipient;

(*d*) the other expenses expedient to the preparation or the bringing of the class action.

1978, c. 8, s. 29.

Reimbursement. **30.** The recipient or, if such is the case, his attorney shall reimburse to the Fonds the amounts paid by it up to the amounts they receive from a third party as fees, costs or expenses.

1978, c. 8, s. 30.

Subrogation.

31. In the cases where the representative was granted assistance, if the defendant in whose favour the final judgment has been rendered shows to the satisfaction of the Fonds that it is impossible for him to obtain the full payment of the judicial costs on the property of the representative, the Fonds, after examining the financial condition of the defendant, may pay these judicial costs in the name of the representative. The Fonds then becomes subrogated in the rights of the defendant up to the amount paid to him.

1978, c. 8, s. 31.

Filing.

32. The Fonds shall file at the office of the Superior Court of the district in which the class action is brought, the conclusions of the decision granting assistance.

Obligation of the court.

The court must hear the Fonds before deciding the payment of costs, determining the fees of the representative's attorney, or approving a transaction on costs or fees.

1978, c. 8, s. 32.

Loss of assistance.

33. A recipient who fails to bring the class action or who is not authorized to bring it, or who loses his status of representative or waives it, is no longer entitled to assistance.

Obligation of recipient.

He must then notify the Fonds, report to it, and reimburse to it the advances received and not yet spent.

1978, c. 8, s. 33.

Assistance to cease *pleno jure*.

34. Assistance ceases *pleno jure* if the recipient uses it for purposes other than those agreed upon; in such case, he shall reimburse the amount of assistance received and not used for the purposes of the class action.

1978, c. 8, s. 34.

DIVISION III

APPEAL

Appeal to the Court of Québec, delay.

35. Every applicant whose application for assistance is denied may appeal from the decision of the Fonds to the Court of Québec by a motion brought within fifteen days of receiving the decision of the Fonds.

Procedure.

The motion shall contain a brief statement of the grounds invoked. It shall be filed at the office of the Court of Québec at the chief place of the judicial district where the applicant is domiciled; it shall be

accompanied by a notice of not less than ten days of the date of its presentation and shall be served on the Fonds.

Evidence. The motion shall not be pleaded in writing but the Court may, upon presentation of the motion, allow the parties to submit the evidence considered necessary.

1978, c. 8, s. 35; 1988, c. 21, s. 66.

Provisions applicable. **36.** The rules of the Code of Civil Procedure respecting proof, hearing and judgment apply *mutatis mutandis* to the appeal brought under this division.

1978, c. 8, s. 36.

Hearing. **37.** The appeal is heard and decided by preference.

Decision. If the Court decides that the applicant is entitled to assistance, it shall order the Fonds to proceed with the granting of the assistance after agreement with the applicant or his attorney in conformity with section 25.

Decision is final. The decision of the Court is final.

1978, c. 8, s. 37.

CHAPTER IV

REGULATIONS

Regulations of the Government. **38.** The Government may, by regulation:

(*a*) fix, for the application of section 42, the percentage withheld by the Fonds from the balance or from a liquidated claim;

(*b*) determine the cases where assistance may be granted to persons who do not reside in Québec and establish criteria and standards in that regard;

(*c*) determine the cases where assistance may be granted to a resident of Québec who intends to institute a proceeding of the nature of a class action outside Québec.

1978, c. 8, s. 38.

Regulations of the Fonds. **39.** The Fonds may, by regulation subject to the approval of the Government:

(*a*) determine the form and content of the applications and of the reports to be filed with the Fonds;

(*b*) determine the amount that an administrator may commit pursuant to section 26;

(*c*) determine the percentage of the assistance that may be remitted to a recipient as an advance payment;

(*d*) *(paragraph repealed)*;

(*e*) prescribe rules necessary for its internal management and the conduct of its business.

1978, c. 8, s. 39; 1986, c. 61, s. 38.

Notice in *Gazette officielle du Québec*.

40. No regulation dealing with the matters contemplated in section 38 or in paragraph *a*, *b*, *c* or *e* of section 39 shall be made except after a notice of thirty days published in the *Gazette officielle du Québec*, setting forth the text thereof.

1978, c. 8, s. 40.

Coming into force.

41. Every regulation made under sections 38 and 39 comes into force on the date of its publication in the *Gazette officielle du Québec* or on any later date fixed therein.

1978, c. 8, s. 41.

CHAPTER V

FINANCIAL PROVISIONS

Percentage withheld by the Fonds.

42. In the case of a collective recovery of the claims, the Fonds shall withhold a percentage fixed by regulation of the Government on the balance established under article 1033 or 1034 of the Code of Civil Procedure; in other cases, the Fonds shall withhold a percentage fixed by regulation of the Government on every liquidated claim.

1978, c. 8, s. 42.

Powers of the Fonds.

43. The Fonds may, with respect to the assistance it grants,

(*a*) spend the sums placed at its disposal for that purpose by the Minister of Justice and those which have been withheld in accordance with section 42;

(*b*) also make, annually, financial commitments other than a loan for an amount up to the amount determined by the Minister of Justice at the time of approval of the budget of the Fonds.

1978, c. 8, s. 43; 1982, c. 37, s. 25.

Loans.

44. In addition to its powers under section 43, the Fonds may, with the prior authorization of the Minister of Justice, contract a loan in respect of the assistance it grants or in order to carry on its operations.

1978, c. 8, s. 44; 1982, c. 37, s. 25.

Powers of the Government.

44.1. The Government, on such conditions as it determines, may

(*a*) undertake to supply the liquidity fund required by the Fonds so as to enable it to repay the capital and interest of a loan contracted by the Fonds, when due;

(*b*) guarantee the payment, in capital and interest, of any loan or other financial commitment contracted or made by the Fonds.

Required sums.

The sums required for the purposes of this section are taken out of the consolidated revenue fund.

1982, c. 37, s. 25.

Sums required.

45. The sums required for the application of this title shall be taken, for the years 1978/1979 and 1979/1980, out of the consolidated revenue fund and for the subsequent years out of the moneys granted each year for that purpose by the Legislature.

1978, c. 8, s. 45.

TITLE III

MISCELLANEOUS PROVISIONS

46. Omitted.

1978, c. 8, s. 46.

47. Omitted.

1978, c. 8, s. 47.

48. Omitted.

1978, c. 8, s. 48.

49. Omitted.

1978, c. 8, s. 49.

50. Omitted.

1978, c. 8, s. 50.

51. Omitted.

1978, c. 8, s. 51.

52. Amendment integrated into c. A-14, s. 63.

1978, c. 8, s. 52.

53. Amendment integrated into c. A-14, s. 80.

1978, c. 8, s. 53.

54. Amendment integrated into c. A-14, s. 87.1.

1978, c. 8, s. 54.

Minister responsible.

55. The Minister of Justice is responsible for the application of this act.

1978, c. 8, s. 55.

Coming into force.

56. This act will come into force on the date to be fixed by proclamation of the Government, except the sections excluded by such proclamation, which will come into force on any later date that may be fixed by proclamation of the Government.

1978, c. 8, s. 56.

57. *(This section ceased to have effect on 17 April 1987).*

1982, c. 21, s. 1; U. K., 1982, c. 11, Sch. B, Part I, s. 33.

REPEAL SCHEDULE

In accordance with section 17 of the Act respecting the consolidation of the statutes and regulations (chapter R-3), chapter 8 of the statutes of 1978, in force on 1 June 1979, is repealed, except sections 46 to 51, effective from the coming into force of chapter R-2.1 of the Revised Statutes.

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UPDATING CONCERNING THIS CHAPTER:

1 JULY 1982
1 MARCH 1985
1 SEPTEMBER 1986
1 SEPTEMBER 1987
1 MARCH 1989

The Law
Reform
Commission

Report No 46

GROUPED PROCEEDINGS IN THE FEDERAL COURT

Summary of report and draft legislation

Australian Government
Publishing Service
Canberra 1988

Note: This volume sets out in summary form the Commission's main recommendations on the issues raised in the Terms of Reference. The full Report, separately available, sets out in detail the material on which the recommendations are based.

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Commission Reference: ALRC 46

The Law Reform Commission is established by section 5 of the Law Reform Commission Act 1973 to review, modernise and simplify the law. The first members were appointed in 1975. The offices of the Commission are at 99 Elizabeth Street, Sydney, NSW Australia (Tel (02) 231 1733; VOCADEX (02) 223 1203).

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Explanatory memorandum to draft Federal Court (Proceedings) Bill 1988	35

Terms of reference

ACCESS TO THE COURTS

I, ROBERT JAMES ELLICOTT, Attorney-General, HAVING REGARD TO —

(a) the function of the Law Reform Commission, in pursuance of references to the Commission made by the Attorney-General, of reviewing laws to which the Law Reform Commission Act 1973 applies, namely —

(i) laws made by, or by the authority of, the Parliament, including laws of the Territories so made; and

(ii) any other laws, includings laws of the Territories, that the Parliament has power to amend or repeal,

with a view to the systematic development and reform of the law, including, in particular —

(i) the modernisation of the law by bringing it into accord with current conditions;

(ii) the simplification of the law; and

(iii) the adoption of new or more effective methods for the administration of the law and the dispensation of justice;

(b) the provisions of section 7 of the said Act which provide that, in the performance of its functions, the Commission shall review such laws with a view to ensuring that such laws do not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions; and

(c) criticism of the restrictions in the present law upon the capacity and right of persons to be heard in courts and proposals which have been made relating to class actions,

HEREBY REFER to the Law Reform Commission, as provided by the Law Reform Commission Act 1973, for REVIEW of the laws to which the said Act applies relating to —

(a) the standing of persons to sue in Federal and other courts whilst exercising federal jurisdiction or in courts exercising jurisdiction under any law of any Territory; and

(b) class actions in such courts,

AND TO REPORT UPON —

(a) the adequacy thereof;

(b) any desirable changes to the existing law in relation thereto but having regard to any constitutional limitations on Commonwealth power; and

(c) any related matter.

IN MAKING ITS REPORT the Commission will also have regard to its function in accordance with section 6(1)(d) of the said Act to consider and present proposals for uniformity between laws of the Territories and laws of the States with a view to such proposals being considered by the States.

DATED this first day of February 1977

RJ Ellicott QC
Attorney-General

Participants

The Commission

In accordance with the Law Reform Commission Act 1973 s 27(1), this Reference was dealt with by a Division of the Commission. At the date of completion of this report, the Division comprised the following members:

President and Commissioner-in-charge

The Honourable Justice Elizabeth Evatt AO, LLB (Syd), LLM (Harv) (from January 1988)

Deputy President

Mr J Greenwell (from November 1987)

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The Honourable Justice PW Young, Supreme Court of New South Wales
The Honourable Justice H Zelling AO CBE

** The recommendations, statements of opinion and conclusions in this report are those of the members of the Commission alone. They should not be taken to represent the views of the consultants or of the organisations with which they are associated.

Summary of Report

Introduction

1. On 1 February 1977 the Attorney-General referred to this Commission two matters relating to the access of citizens to the courts:

- the standing of persons to sue in federal and other courts whilst exercising federal jurisdiction or in court's exercising jurisdiction under any law of any Territory
- class actions in such courts.

This report deals with the second of these matters, class actions.

Are new procedures needed to deal with multiple wrongs?

The question

2. The question is whether there is a need to introduce any new form of representative or class procedure to deal with multiple wrongs. The term 'multiple wrong' describes situations where a single person has caused loss, damage or injury to a number of people in circumstances where there is a legal liability to pay compensation or some other monetary relief or where injunctive or declaratory relief is available. In an age of mass production and distribution of goods and services, the potential for loss or damage to be caused on a mass scale is high. While the overall damage may be great, the amount of damage incurred by an individual may be relatively small in proportion to the cost of legal services and of court proceedings.

Barriers to access

3. If cost factors preclude enforcement of rights, or if people are ignorant of their legal rights or intimidated by the legal system, loss or damage for which the law says compensation should be paid goes uncompensated. It is borne, not by the person causing it, but by the person who suffers it. Cost and other barriers which inhibit peoples access to the courts should be lowered if it is cost effective to do so, so that people can receive the compensation to which the law says they are entitled. Unless the cost to the individual of recovering compensation can be reduced, a person may be held accountable for causing damage of $500 000 to one person but escape liability if damage of $1000 is caused to each of 500 people.

Efficient use of resources

4. Even if those affected by a multiple wrong each have substantial claims which justify bringing individual legal proceedings, unnecessary costs may be incurred by those parties and the community if the same issues have to be heard

and determined separately for a number of people. An efficient use of resources would involve procedures that enable common issues to be determined in one proceeding for all affected. A multiplicity of proceedings could be avoided and consistency of decision making promoted.

What is a class action?

5. Class actions enable a single applicant to bring proceedings on behalf of a group or class of people with similar claims against the same respondent. There are two features of class actions which set this kind of procedure apart from other procedures involving multiple parties:

- class actions may include claims for damages, the amount of which may vary from person to person
- proceedings can be commenced without the need to identify each member of the class and without the consent of each member.

A general feature of class actions in those jurisdictions where they exist is that class members can opt out of the proceedings on receiving notice of their commencement if they do not wish to be included. The traditional representative proceedings rule, which is available in most Australian jurisdictions, allows one person to commence proceedings on behalf of numerous persons who have the same interest in the proceedings. This rule has been interpreted by the courts to be limited to cases where the relief sought is an injunction or declaration. It cannot be used to claim damages. Other multiple party procedures (such as joinder and consolidation) permit damages to be claimed but require the consent of the parties in most cases. There is no procedure in federal jurisdictions under which proceedings claiming damages can be brought on behalf of a class or group of persons.

Effect of class actions and related procedures

6. *Promoting access and efficiency.* The recommendations in this report are concerned with

- reducing the cost of court proceedings to the individual
- enhancing access by the individual to legal remedies
- promoting efficiency in the use of court resources
- ensuring consistency in the determination of common issues
- making the law more enforceable and effective.

There are many programs and procedures which help to promote access to the courts and efficiency in the use of judicial and other resources. They include legal aid, small claims tribunals, community dispute resolution, industry self-regulation and commercial arbitration. There are also provisions for public action to be taken in cases of multiple wrongdoing, particularly by the Trade Practices Commission and Royal Commissions and inquiries. Finally, there are court procedures for dealing with multiple claims including representative actions, joinder, consolidation and test cases.

7. *Deficiencies in the system.* These programs and procedures are not, however, comprehensive. What is absent is a procedure enabling private action to be taken in cases of alleged multiple wrongdoing to secure a binding decision in respect of all affected. Court procedures have been inadequate to deal with cases of multiple wrongdoing except on an ad hoc basis. Specific deficiencies are

- individuals have no means of obtaining legal remedies in courts where the amount of the claim, though significant, does not warrant the cost of legal proceedings; in any event, where claims arise from multiple wrongdoing, individual litigation is not an efficient use of resources
- alternative, less expensive means of resolving small claims are not available in all cases; alternate means require individual action and are inadequate to deal efficiently with multiple wrongdoing
- there is no effective federal procedure by which claims for damages arising from multiple wrongdoing can be grouped together so that common issues can be dealt with at the same time, thus reducing the cost of litigation to the individual and avoiding a multiplicity of proceedings
- there is no federal procedure enabling proceedings to be brought for damages on behalf of a group or class of people who have suffered loss or injury as a result of a multiple wrong.

8. *Advantages of a new grouping procedure.* Where a number of people suffer loss, injury or damage as a result of a multiple wrong, a class action or other effective grouping procedure could help to reduce costs for each member of the group as well as promote efficiency in the administration of justice. Where the claims are 'individually recoverable' (that is, where amont at issue is more than the cost of recovering it), the primary policy goals of such procedures are to enable the most efficient use to be made of resources to ensure consistency in decision making. Where the claims are 'individually non-recoverable' (that is, where the cost of legal proceedings is high in relation to the amount claimed), the grouping of claims may reduce the costs of litigation to the individual and thus enhance access to the remedy the law already provides. There are, however, some claims which are so small that, even where efficient, economic and fair grouping procedures are available, the costs of recovery will exceed the total benefits of litigating. It is not necessary to extend new procedures to this kind of case. The object of new procedures should be to reduce the costs of litigation where it is necessary and worthwhile in the interests of justice, not to encourage abuse or the pursuit of the trivial.

Examples of cases where a new grouping procedure would be desirable

9. There are number of examples which illustrate the kinds of cases in which such a grouping procedure would be desirable.

- *Misleading advertisement by credit union.* A pamphlet was distributed by a large credit union advertising insurance for persons entering into personal loans. It suggested that loan payments would be covered by insurance in the event of sickness or injury for as long as any disability lasted. A number of individuals who had obtained loans in response to the advertisement were unable to meet their payments due to illness. It was discovered, however, that their insurance cover only applied if they were totally or permanently incapacitated. Proceedings were instituted by the credit union for the recovery of money owing. The defendants concerned alleged that they had been misled to believe that the insurance would cover them in the event of partial incapacity. Separate proceedings have been necessary in respect of each individual affected to determine whether the representation was misleading or deceptive. In each case separate applications, statements of claim, requests and replies in relation to further particulars, lists of documents on discovery and other procedural steps have been required.[1] The costs involved in such duplication could have been avoided if the claims could have been run as one proceeding. Another borrower has now been identified complaining of alleged misrepresentation arising from the credit union's advertised insurance scheme. The proceedings already commenced concerning the issue whether the representation was misleading or deceptive will not obtain help for this borrower or any other individuals who are later identified. A grouping procedure might ensure that further proceedings would not be brought in respect of common issues.

- *Injury caused by IUD.* Approximately 1500 Australian women are involved in a claim against AH Robins' Australian subsidiary for injuries arising from the use of the Dalkon Shield birth control device. The claims were initiated in the Supreme Court (NSW) by way of ten summons on behalf of groups of named plaintiffs with common heads of damage. This course of action was taken partly to avoid the large scale duplication of issuing separate statements of claim and filing fees in relation to each individual claimant. An application was made by the defendant, AH Robins Pty Limited, to strike out the proceedings on the basis that the summons were in breach of the requirements of the Rules and an abuse of the Court's process. In response to the application to strike out the proceedings, the solicitors for the plaintiffs sought orders allowing one or more plaintiffs' actions to be nominated as 'lead' actions so that duplication of pleadings and procedural steps such as discovery could be avoided. This case illustrates the difficulties of commencing proceedings on behalf of a large number of individuals and the inadequacy of the current procedures.[2] A grouping procedure would have enabled proceedings to be commenced on behalf of all affected.

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[1] *Zoneff v Elcom Credit Union Limited* Federal Court (Sydney registry) G863, 1988.

[2] See eg *Burford v AH Robins Pty Ltd* Supreme Court (NSW) No 12530 of 1986.

- *Losses by cruise passengers.* An attempt was made to bring representative proceedings for 83 passengers on a cruise ship who suffered injury and lost baggage when the ship sank. The Supreme Court (NSW) decided that a representative proceeding could not be used to claim damages. Individual claims would be needed. The lack of an effective means of resolving common issues in one proceeding adds to the cost and delay of the case for all involved.[3]

- *Camera goes out of production.* A leading camera manufacturer marketed a brand of instant camera over a number of years. It announced that it will no longer produce film for its instant cameras, an action which renders the camera useless. The Trade Practices Act 1974 (Cth) gives customers a right to recover in such cases. Under existing procedures the costs of bringing litigation for the recovery of loss incurred in such circumstances would clearly outweigh the amount to be recovered in respect of any individual claim. A grouped proceeding could enable the costs to be shared among a substantial number of persons and enable legally enforceable rights to be pursued in such cases where recovery of loss may otherwise have been impracticable.

In cases such as these, an effective grouping procedure could reduce the cost of enforcing legal remedies in cases of multiple wrongdoing. The cost and other barriers which impede people from pursuing a legal remedy could be overcome if one member of a group, all similarly affected, could commence proceedings on behalf of all members. The grouping of claims could also promote efficiency in the use of resources by enabling common issues to be dealt with together. Appropriate grouping procedures are an essential part of the legal system's response to multiple wrongdoing in an increasingly complex world.

The Commission's recomemnded procedure

Introduction

10. The Commission has devised a detailed, cost effective scheme for the grouping of claims in the Federal Court which balances the interests of all parties and achieves the goals of access and court efficiency.

Federal Court and its jurisdiction

11. Because the Federal Court has evolved specific techniques which would be useful in overcoming management problems which may arise in grouped proceedings, the Commission recommends that the use of the procedure be confined in the first instance to the Federal Court. In the long term, after experience and assessment, it may be given a broader application to State or Territory courts exercising federal jurisdiction or jurisdiction under Territory law. The main federal areas where the procedure would operate are

[3] *Dillon v Charter Travel Co Ltd* (1988) ATPR 40-872.

- proceedings against the Commonwealth
- claims under federal laws (for example, pursuant to the Trade Practices Act 1974 (Cth))
- under federal administrative law
- under federal tax law
- under federal industrial and intellectual property law.

Grouped proceedings, not a representative proceeding

12. *The procedure is a 'bundle' of proceedings being conducted together, not a representative procedure.* For constitutional reasons the procedure recommended by the Commission involves each person with a relevant and related claim being made a party to a separate proceeding, rather than being represented by one of their number in a single proceeding. A proceeding is commenced for each member of the group, even if they have different causes of action, claim different relief or rely on different bases of jurisdiction. All these proceedings are then 'bundled together' and conducted by one of the group together with his or her own proceeding. That person is called a principal applicant and that proceeding the principal proceeding. The other applicants are called group members and their proceedings group members' proceedings.[4] There would be as many separate proceedings as there are group members plus the principal applicant's proceeding. The claims of the principal applicant must include a claim in respect of a federal or Territory matter as defined[5] and the jurisdiction of the Federal Court is extended to cover these claims, but only where the grouped procedure is invoked. The claims of the group members must be in respect of that federal or Territory matter or must relate to it.[6] This extension of jurisdiction of the Federal Court, relating only to grouped proceedings, would give the Court comprehensive federal jurisdiction so that related claims can benefit from the grouping procedure. This approach is consistent with the principles embodied in the recent cross-vesting legislation.

13. *Consent of group members not necessary.* It is not necessary for group members to consent to the commencement of their proceeding but, on receiving notice that the proceeding has been commenced, a group member may choose to opt out by either discontinuing his or her proceeding or conducting it himself or herself as an individual proceeding.[7] This approach is compatible with all the different purposes served by the grouping of claims, including

- ensuring that all persons with the same interest in an issue are bound by a single decision on that issue; if members have identical interests, an action or decision in respect of one can, without injustice, be taken to apply to the others

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[4] cl 7.
[5] cl 5.
[6] cl 11.
[7] cl 8, 19.

- reducing costs and increasing efficiency by enabling a single determination of issues which are common to members of the group
- enhancing legal access remedies by overcoming cost barriers or lack of knowledge.

The only way of achieving all these policies is by enabling proceedings to be commenced in respect of all persons who have related claims arising from the same wrong without requiring their consent, while preserving their interests and freedom of choice by enabling them to opt out without penalty. Freedom of choice is only a reality in cases where it is possible for group members to pursue their rights individually. Where a person is unable to pursue a remedy individually because of cost or other barriers, that person may have no other means of obtaining legal redress. If it is necessary to obtain the consent of that person before commencing proceedings, many people may be excluded from a remedy because they were not known or did not know they were entitled to a legal remedy. One of the purposes of grouped proceedings, that is, to enhance access to legal remedies, would be defeated if it were necessary to obtain consent in advance.

Criteria for commencement

14. *Number of proceedings.* To commence grouped proceedings there must be at least seven group members plus the principal applicant, making eight in all.[8] It should not be necessary to identify the group members by name.[9] Establishing a minimum number promotes the efficiency of the procedure and ensures that cases are not grouped where consolidation or joinder is more appropriate. Where there are less than eight applicants, the Court should have a discretion to allow grouped proceedings to continue or to separate the proceedings and direct that they be continued as individual proceedings.[10]

15. *Relationship between proceedings.* Even if the circumstances giving rise to relief are the same, the relief claimed may differ. For example, in Admiralty cases arising out of the sinking of a ship, there may be claims for personal injury by some passengers and claims for property damage by others. While group members' proceedings need not be for the same relief as the relief sought in the principal proceeding, or in other group members' proceedings,[11] the material facts giving rise to each claim for relief in each group members' proceeding must be the same as, or similar or related to, the material facts giving rise to a claim for relief in the principal proceeding.[12] In addition, each group member's proceeding must contain at least one question of law or of fact that is common

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[8] cl 10.
[9] cl 13.
[10] cl 10.
[11] cl 9.
[12] cl 12(1)(b).

to the proceedings of each other group member and the principal applicant.[13] These requirements ensure that there is a community of interests between group members and the principal applicant.

16. *No certification procedure.* Although certification procedures are required for class actions in the United States, Quebec and South Australia, the Commission does not recommend such a procedure. There is no need to go to the expense of a special hearing to determine that the requirements of a grouped proceeding have been complied with, as long as the respondent has a right to challenge the validity of the procedure at any time.

Later causes of action

17. Individuals whose cause of action does not accrue until after grouped proceedings have been commenced will not be included in the group unless the Court, on application by any party or a potential group member, gives leave to include such causes of action in the grouped proceeding.[14] An example of a situation where this may be appropriate is the mesothelioma claims in Western Australia. Where a person is diagnosed after the commencement of the proceedings, the Court may find that it is proper to enable his or her claim to be dealt with in the grouped proceeding. The Court could allow actions which accrued by a specified date to be included.

Protection against abuse

18. The recommended scheme has a number of provisions which ensure that the procedure will be cost effective and that there will be little, if any, scope for trivial claims or blackmail suits.

- *Cost effectiveness.* Where the claims are divergent or complex, the overall costs to the parties and to the administration of justice may be more than the combined cost of separate proceedings. Where the Court is unable to deal with grouped claims economically as compared with individual proceedings, the proceedings can be separated. Each group member would become responsible for conducting his or her own claim.[15]

- *Impracticability of distribution.* If the costs that the respondent would have to bear in relation to identifying group members and distributing to them any monetary relief would be excessive having regard to the total amount in issue, the proceedings should not be grouped. To preserve the right of individual group members to conduct or to bring their own proceedings, the Court should be able to separate, stay or dismiss any of the proceedings without prejudice to any further claim by group members.[16]

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[13] cl 12(1)(a).
[14] cl 15.
[15] cl 20.
[16] cl 17.

- *Inclusion of all potential group members.* If the principal applicant fails to include all group members in the application, those excluded would not have the opportunity to be part of the proceedings and the respondent would not have the benefit of a common binding decision in respect of all potential claimants.[17] In this case proceedings can be stayed on the application of a potential member or of the respondent.

- *Blackmail actions.* There will be little scope for principal applicants to commence proceedings which have no merit in the hope of forcing a settlement. First, the Court can dismiss the proceedings if they are frivolous, vexatious or an abuse of process.[18] Secondly, the general rule that the loser pays the winner's costs, which the Commission recommends not be changed, means that the principal applicant will be liable for costs if the case fails. These costs would be higher than for individual proceedings. Consequently there would be a stronger disincentive to the commencement of blackmail suits than is the case for individual proceedings.

19. *Principal applicant to have conduct of group members' proceedings.* The principal proceeding and all the group members' proceedings of which the principal applicant has the conduct are conducted as one proceeding and treated as one proceeding for the purposes of the Federal Court Act of Australia 1976 (Cth) and the Federal Court Rules (Cth).[19] In general terms, the principal applicant has the conduct of group members' proceedings and a step taken by the principal applicant in a group member's proceeding binds the group member.[20] To avoid duplication of procedural steps, a group member can take a step in his or her own proceeding only with leave. Similarly, a respondent may not take a step against a group member without leave.[21] The principal applicant can be replaced if he or she is not conducting group member's proceedings in their interests.[22]

Conduct of proceedings

20. *Group members may need to assume conduct of their proceedings in relation to individual issues.* Although there must always be at least one common question of law or of fact which has to be determined for all group members, there may be issues which must be decided separately in relation to each group member, for example, the quantum of damages to which a party is entitled following determination of liability. Where individual issues arise, the Court is able to give a group member the conduct of his or her proceeding so far as it relates to those issues.[23] There may also be issues which relate to some but not all group members. For example, a grouped proceeding which alleged

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[17] cl 14.
[18] cl 6(1)(c).
[19] cl 16(2).
[20] cl 16(1).
[21] cl 16(4).
[22] cl 23.
[23] cl 21.

discrimination in employment may include the claims of those who applied for a position but were not hired and those who were retrenched. Extra principal applicants may be required where there are sub-groups which need to be represented separately in the proceedings.[24]

21. *Notice must be given to group members.* Because the consent of group members is not required to commence their proceedings, appropriate steps must be taken to inform them that proceedings have been commenced and that they may opt out of those proceedings.[25] There are other situations where group members must receive notice, including where application has been made to approve a settlement and where money has been brought into Court.[26] The Court also has a discretion to order notice at any other appropriate time, including where the principal applicant needs to be replaced or another principal applicant is needed to represent a sub-group.[27] Because the cost of personal notice to group members may be quite high, it is not required unless it is reasonably practicable and not unduly expensive. In most cases notice by press advertisement or by radio or television broadcast will be sufficient.[28]

Conclusion of proceedings

22. *Approval must be given for settlement, discontinuance etc of proceedings.* In the interests of group members, the Court has to approve any proposed settlement of their proceeding or the acceptance of any money paid into Court by the respondent in respect of their proceeding. If the principal applicant wishes to discontinue group members' proceedings, the Court's approval is also required.[29] A group member may settle or accept money paid into Court in respect of his or her own proceedings at any stage in accordance with the Federal Court Rules, without leave.[30]

23. *The Court may make an aggregate assessment of monetary relief.* There may be some cases where it will be appropriate for the Court to determine the total quantum of liability of the respondent to some or all group members without specifying the amount to be paid to each person. Examples of situations where such aggregate assessment may be appropriate are where

- the number of group members and the extent of each of their claims can be obtained from the respondent's records or otherwise, without the need for further assessment
- the total liability of the respondent can be established without determining the share of each member of the group
- the total liability of the respondent can be determined in some other way with reasonable accuracy.

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[24] cl 22.
[25] cl 18(1).
[26] cl 18(2)-(3).
[27] cl 18(5).
[28] cl 18(7).
[29] cl 28(1)(2).
[30] cl 28(5).

One global assessment of monetary relief will, generally speaking, be a more efficient and cheaper means of giving judgment than many separate assessments, particularly in cases where there are relatively small claims which would not justify the cost of individual proof. However, an aggregate award can only be made where the assessment can be made with reasonable accuracy.[31] In cases where the extent of damages varies from person to person and is not capable of calculation on a global basis, aggregate assessment will not be possible.

24. *Surplus or residue.* Aggregate assessment of damages will determine the respondent's liability in relation to all group members whether or not they have been identified. Some may not come forward to claim their money even if notice is given. The respondent is able to apply for the repayment of any amount not required for payment to group members who do not come forward within the time prescribed by the Court.[32] Returning any unclaimed money to the respondent is in keeping with the primary aim of the procedure, which is to compensate individuals in an efficient and cost effective manner, not to penalise respondents. The basic rule is that the residue is to be returned unless it would be unjust to do so because, for example, exemplary damages have been awarded. Given the fact that an aggregate assessment will be appropriate only in limited circumstances and that failure to return any residue to the respondent will be the exception rather than the rule, the occasions on which there is an unreturned residue are likely to be very few.

Costs

25. The existing costs rule are retained in relation to grouped proceedings so that, in the normal course, the loser would be ordered to pay the party-party costs of the winner. Consequently, if grouped proceedings were unsuccessful, the principal applicant would have to bear the entire solicitor-client costs (because group members would not be a party to any contract with the principal applicant's solicitor to pay these costs) plus a share of the party-party costs awarded to the respondent. As parties, group members would, on ordinary principles, be liable for their share of party-party costs. In the context of grouped proceedings, this wouyld eb impracticable and could possibly work injustice. The Commission therefore recommends that group members be immune from paying the respondent's costs unless they conducted their own proceedings.[33] The principal applicant would thus be solely liable for the party-party costs if the action fails. Where the action is successful, the principal applicant would also be liable for the balance of solicitor-client costs not covered by party-party costs paid by the respondent. In either case, win or lose, the principal applicant will be liable for higher costs than if individual proceedings were an effective part in the Court's procedures. Some modification to the costs regime is desirable if grouped proceedings are to be brought. A contingent fee agreement between the principal applicant and the solicitor, providing for no fees to be paid if the case is lost and for a higher than normal fee if the case is successful, would

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[31] cl 30(3).
[32] cl 30(8).
[33] cl 31(1).

mean that the principal applicant would not be liable for solicitor-client costs in unsuccessful cases. Such an agreement could provide for a contribution to solicitor-client costs from group members in successful cases. A contingent fee should not be calculated as a percentage of any amount recovered:[34] additional fees should be calculated as an increase on scale costs or on some other non-percentage basis and is intended to compensate for the risk of being paid nothing if the case is lost. In most individually recoverable claims, the saving in solicitor-client costs which would be made possible through a fee agreement would offset the higher party-party costs making grouped proceedings viable. For individually non-recoverable cases however, public funding may provide the only solution to the costs barriers. The Commission therefore recommends a special fund to finance grouped proceedings.

Evaluation of the proposal

Main effect: transfer of loss for which liability arises

26. The recommended procedure facilitates access to legal remedies and promotes efficiency in the determination of legal rights. However, changes in procedural rules could have effects which go beyond the correction of perceived ills. An analysis of the costs which might be incurred under the proposed procedure demonstrates that the main costs involved are those arising from the loss and damage, caused by the actions of the respondent and for which the respondent is legally liable. Those costs are now borne by the persons suffering loss and damage. Under the recommendations there would be more opportunity for them to be transferred to the person who is legally responsible for the loss.

Containing transaction costs

27. The transaction costs involved in this transfer prove, on examination, not to be excessive in relation to the amounts likely to be in issue. The Commission has concluded that it is reasonable for them to be incurred by those the law holds responsible for loss or injury in order to ensure, to a greater extent than is presently the case, that the costs of such loss and injury are not borne by the person suffering the loss, but by those who have the legal responsibility for it. There are express safeguards built in to the scheme to contain any additional costs and to ensure the cost effectiveness of the procedure.

- Respondents can apply for the action to be dismissed if it is frivolous, vexatious or an abuse of process. This possibility together with the effect of the costs scheme will significantly decrease the likelihood of blackmail suits.

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[34] cl 33.

- The proceedings can be dismissed if the costs to the respondent of identifying group members and distributing any monetary relief to them is excessive having regard to the total of the amounts likely to be ordered to be paid the proceedings.

- The proceedings can be separated if the costs of conducting them together are greater than the costs of conducting them separately.

- The proceedings can be stayed if the principal applicant fails to include all group members in the application thus depriving the respondent of the benefits of a common binding decision in respect of all potential claimants.

Cost effective scheme

28. The result is a scheme which has the potential to allow individuals to obtain legal redress, where this can be done in a cost effective manner, and which promotes efficient use of Court resources.

Draft Bill

- Draft Federal Court (Grouped Proceedings) Bill 1988
- Explanatory memorandum to draft Federal Court (Grouped Proceedings) Bill 1988

FEDERAL COURT (GROUPED PROCEEDINGS) BILL 1988

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A BILL

FOR

An Act to provide for the grouping of proceedings in the Federal Court of Australia, and for related purposes

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

Short title

1. This Act may be cited as the *Federal Court (Grouped Proceedings) Act 1988*.

Commencement

2. This Act commences on a day fixed by Proclamation.

External Territories

3. This Act extends to each external Territory including Norfolk Island.

Act to bind Crown

4. This Act binds the Crown in each of its capacities.

Interpretation

5. (1) In this Act, unless the contrary intention appears:

"excluded Act" means:

(a) the *Family Law Act 1975*;

(b) the *Jurisdiction of Courts (Cross-vesting) Act 1987*;

(c) the *Marriage Act 1961*;

(d) the *Norfolk Island Act 1979*; or

(e) the *Northern Territory (Self-Government) Act 1978*;

or any of the applied provisions as defined by section 3 of the *Commonwealth Places (Application of Laws) Act 1970*;

"Federal Court Act" means the *Federal Court of Australia Act 1976*;

"federal matter" means a matter:

(a) arising under an Act other than an excluded Act or under an instrument (including a rule, regulations and a by-law) made or in force under an Act other than an excluded Act;

(b) in which relief is sought against the Commonwealth; or

(c) of a kind mentioned in paragraph 75(v) of the Constitution;

"group member" means a person identified in subsection 7(1) as a group member but does not include a person who has the conduct of a proceeding;

"group member's proceeding" means a proceeding identified in subsection 7(1) as a group member's proceeding;

"principal applicant" means a person identified in subsection 7(1) as a principal applicant and includes a person who has the conduct of 2 or more group members' proceedings;

"principal proceeding" means a proceeding identified in subsection 7(1) as a principal proceeding;

"Rules" means the Federal Court Rules;

"Territory matter" means a matter in respect of which a court of a Territory other than the Northern Territory or Norfolk Island has jurisdiction apart from the *Jurisdiction of Courts (Cross-vesting) Act 1987* or a law of a State relating to cross-vesting of jurisdiction.

(2) Other expressions in this Act have the meanings they have under the Federal Court Act.

Operation of other laws etc.

6. (1) Except as otherwise provided by this Act, this Act does not affect:

(a) a right of a person to commence and maintain a proceeding;

(b) the powers of a court in relation to a proceeding, for example, its powers in relation to a proceeding in which no reasonable cause

of action is disclosed or that is oppressive, vexatious, frivolous or an abuse of the process of a court; or

(c) the operation of a law relating to:

(i) vexatious litigants (however described);

(ii) representative proceedings;

(iii) joinder of parties; or

(iv) consolidation of proceedings.

(2) This Act does not have effect to create a cause of action that would not have existed if this Act had not been enacted.

Commencement of grouped proceedings lawful

7. (1) It is lawful for a person (the principal applicant) who commences a proceeding in the Court against a respondent (the principal proceeding) also to commence, by the same application, other proceedings (group members' proceedings), each within the jurisdiction of the Court and each between another person (a group member) as applicant and the respondent.

(2) A group member shall not be taken to have breached an agreement or contravened a law or an order of a court (including a law of, or a court of, a State) merely because a proceeding has been commenced as mentioned in subsection (1), but this subsection does not affect any other right the respondent may have arising out of the agreement, law or order.

Consent of, or tutor, etc, for, group members not essential

8. (1) The consent of the group member is not necessary to commence a group member's proceeding unless the group member is:

(a) the Commonwealth or a State;

(b) a Minister of State or a Minister of a State or Territory;

(c) a body corporate established for public purposes by a law of the Commonwealth or of a State or Territory (not being a company); or

(d) an officer of the Commonwealth, or of a State or Territory, in his or her capacity as such an officer.

(2) A tutor, guardian or next friend need not be appointed for a group member except for the purpose of the group member taking a step in, or conducting, the group member's proceeding.

Different relief may be claimed

9. A group member's proceeding need not be for the same relief as the relief sought in the principal proceeding or in another group member's proceeding.

Minimum of 7 group members needed

10. (1) If, at any stage, the Court finds that there are fewer than 7 group members' proceedings, it may, by order:

(a) allow the proceedings to continue under this Act; or

(b) give the conduct of each group member's proceeding to the group member.

(2) The order may be conditional.

Jurisdictional requirements

11. (1) The principal proceeding must be in respect of a federal matter or a Territory matter (whether or not it is also in respect of other matters), and the jurisdiction of the Court with respect to such proceedings extends to all federal matters, and Territory matters, not otherwise within the jurisdiction of the Court.

(2) The jurisdiction of the Court with respect to a group member's proceeding extends to all matters mentioned in section 75 or 76 of the Constitution, and all Territory matters, not otherwise within the jurisdiction of the Court.

(3) The jurisdiction conferred by subsections (1) and (2) does not extend to jurisdiction in respect of matters:

(a) mentioned in paragraphs 38(a) to (d) (inclusive) of the *Judiciary Act 1903*; or

(b) in which a writ of mandamus or prohibition, or an injunction is sought against an officer of the Commonwealth who is, or officers of the Commonwealth who are:

(i) a person or persons holding office under the *Conciliation and Arbitration Act 1904* or the *Coal Industry Act 1946*; or

(ii) a Judge or Judges of the Family Court of Australia.

(4) Subsections (1) and (2) do not affect the jurisdiction of any other court.

Links between principal proceeding and group members' proceedings

12. (1) An application as mentioned in subsection 7(1) may only be made if:

(a) a question arises in the principal applicant's proceeding, so far as that proceeding is in respect of a federal matter or a Territory matter, that is common to that proceeding and to each group member's proceeding; and

(b) the material facts giving rise to each claim for relief in each group member's proceeding are the same as, or similar or related to, the material facts giving rise to a claim for relief in the principal proceeding, so far as that proceeding is in respect of a federal matter or a Territory matter.

(2) For the purposes of paragraph (1)(b), material facts relating to different transactions or events shall not be taken to be dissimilar or unrelated for that reason alone.

Form etc, of originating process

13. An application made as mentioned in subsection 7(1), or a document filed in support of such an application, must:

(a) describe or otherwise identify the group members, but it is not necessary to name, or specify the number of, the group members; and

(b) specify the relief claimed in the principal proceeding and in each of the group members' proceedings.

Addition of further group members: incomplete groups

14. (1) If the Court, on application in the principal applicant's proceeding, finds that there are persons who are not group members but in respect of whom group members' proceedings could have been commenced as mentioned in subsection 7(1), the Court may stay all the proceedings for a specified time.

(2) If, at the end of that time, the principal applicant has not amended or sought leave to amend the application by which the proceedings were all commenced to commence further group members' proceedings between those persons and the respondent, then, if the Court finds that:

(a) substantial inconvenience, expense or prejudice would be likely to be caused to the respondent or to the person who made the

application mentioned in subsection (1) unless the application by which the proceedings were all commenced were so amended; and

(b) it would be unlikely that substantial expense or inconvenience would be caused to the principal applicant if that application were so amended,

the Court may, by order:

(c) give the conduct of each group member's proceeding to that group member; or

(d) appoint a group member, or a person in respect of whom a group member's proceeding could have been commenced as mentioned in subsection 7(1), to be the principal applicant in substitution for the principal applicant.

(3) An application under subsection (1) may be made by the respondent or by a person in respect of whom a group member's proceeding could have been commenced as mentioned in subsection 7(1).

(4) The Court may make any necessary consequential order, including an order as to notice or as to the effect of steps already taken by the principal applicant.

Addition of further group members: causes of action accruing after commencement

15. (1) The Court may, on application:

(a) fix a day before judgment for the purposes of this section; and

(b) by order, amend the application so as to commence further group members' proceedings on causes of action that accrued after the principal proceeding was commenced but before the day so fixed.

(2) Sections 8 to 13 (inclusive) apply in respect of those group members' proceedings as they apply to the other group members' proceedings.

(3) The Court may make any necessary consequential order, including an order as to notice or as to the effect of steps already taken by the principal applicant.

Proceedings to be conducted as 1 proceeding

16. (1) The principal applicant has the conduct of the group members' proceedings and, subject to the operation of subsection (5), a step taken by the principal applicant in a group member's proceeding binds the group member.

(2) The principal proceeding and all the group members' proceedings of which the principal applicant has the conduct:

(a) shall be conducted as one proceeding; and

(b) shall, for the purposes of the application of the Federal Court Act and the Rules, be treated as one proceeding.

(3) In a group member's proceeding, service on the principal applicant is effective service on the group member.

(4) Except as provided by this Act and the Rules, in a group member's proceeding:

(a) the group member may not take a step without the leave of the Court; and

(b) the respondent may not, without the leave of the Court, require the group member to do anything personally in relation to the proceeding.

(5) If, with the Court's leave, a group member takes a step in that group member's proceeding, the step has effect notwithstanding any step taken by the principal applicant.

(6) Subsections (1) to (5), inclusive, have effect subject to this Act, the Rules and an order of the Court made under this Act or the Rules.

Powers of Court where money claimed

17. (1) If:

(a) the relief claimed in group members' proceedings is or includes payment of money (other than on account of costs); and

(b) on application by the respondent, the Court finds that, if judgment were to be given in favour of each of those group members, it would be highly likely that the cost of identifying the group members, and distributing to them the amounts likely to be ordered to be paid to them, being costs that would be borne by the respondent, would be excessive, having regard to the total of the those amounts;

the Court may by order:

(c) give the conduct of each group member's proceeding, so far as it relates to that relief, to the group member;

(d) stay any group member's proceeding so far as it relates to that relief; or

(e) dismiss the group members' proceedings.

(2) Such a dismissal is not, unless the Court otherwise orders when dismissing the proceedings, a defence in a proceeding between a group member and the respondent on the same, or substantially the same, cause of action.

Notice

18. (1) Unless the Court otherwise orders, notice, as approved by the Court, of the commencement of a principal proceeding and group members' proceedings and the ways in which group members may assume the conduct of their proceedings must be given to group members as soon as practicable after the first directions hearing.

(2) Unless the Court is satisfied that it is just to do so, an application for approval under section 28 of a settlement or for approval under section 33 of a fee agreement shall not be determined unless notice, as approved by the Court, has been given to group members.

(3) Unless the Court otherwise orders, notice, as approved by the Court, must be given to group members of the bringing into Court of money in answer to a cause of action in the group members' proceedings.

(4) Unless the Court otherwise orders, notice, as approved by the Court, shall be given to group members of an application by the respondent to dismiss a group member's proceeding on the ground of want of prosecution.

(5) The Court may, at any other stage, order that notice, as approved by the Court, be given to a group member.

(6) In each case, the Court shall, by order, specify:

(a) who is to give the notice; and

(b) the way in which notice is to be given;

and the order may include provision:

(c) directing a party to provide information relevant to giving the notice; and

(d) as to the costs of notice.

(7) The order may provide that notice be given by press advertisment or by radio or television broadcast, but the Court shall not order that

notice be given personally to each group member unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so.

(8) A notice that concerns a matter for which the Court's leave or approval is required must specify the period within which a group member or other person may apply to the Court, or take some other step, in relation to the matter.

(9) A notice that includes or concerns conditions must specify the conditions and the period, if any, for compliance.

(10) The failure of a group member to receive or respond to a notice does not affect a step taken, an order made or a judgment given in a proceeding, but the Court may, on application by the group member, make any proper order.

Group members may 'opt out'

19. (1) A group member may, by giving notice in accordance with the Rules, assume the conduct of the group member's proceeding.

(2) The group member may, by the same notice, discontinue the group member's proceeding.

(3) If the Court specifies a day for the purposes of this section, the notice may not be given after that day without the Court's leave.

Group member may be given conduct of proceedings

20. If the Court, at any stage, finds that the costs that would be incurred if the proceedings were to continue to be conducted under this Act are likely to exceed the costs that would be incurred if the proceedings were to be conducted as separate proceedings, the Court may by order, give the conduct of 2 or more of the group members' proceedings to 1 or more of those group members.

Group member may be given conduct of proceedings on particular questions

21. The Court may, at any stage, by order, give to a group member the conduct of the group member's proceeding so far as it relates to a particular question arising in the proceeding, if such an order is necessary for the question to be properly determined.

Group member may become additional principal applicant

22. The Court may, at any stage, by order, give the conduct of 2 or more group members' proceedings, so far as they relate to a particular

question, to 1 of those group members if it is convenient and appropriate to do so.

Group member may replace principal applicant

23. (1) The Court may, at any stage, by order, give the conduct of 2 or more group members' proceedings to 1 of those group members in substitution for the principal applicant if the principal applicant:

(a) is not conducting those proceedings; or

(b) is unable to conduct those proceedings;

in the interests of the group members.

(2) A person whose proceeding has been concluded may not be given or continue to have the conduct of group members' proceedings.

Provisions applicable to the operation of section 19 to 23 (inclusive)

24. (1) Where the principal applicant ceases to have the conduct of a group member's proceeding, the Court may make any necessary consequential order.

(2) An order under section 21, 22 or 23 may be made on application by a group member, without leave, by the principal applicant or of the Court's own motion.

Legal representation

25. A principal applicant may not, without the Court's leave, conduct a group member's proceeding otherwise than by a solicitor or barrister who is not a group member.

Discovered documents

26. A document or thing in respect of which discovery has been given in a principal proceeding or a group member's proceeding shall, unless the Court otherwise orders, be taken to have been discovered in all the proceedings.

Certain claims by respondents against group members

27. Where the respondent in a group member's proceeding commences a proceeding in the Court against the group member, the Court may order that any relief awarded to the group member in the group member's proceeding be stayed until the other proceeding is determined.

Discontinuance, settlement etc, of group members' proceedings

28. (1) A principal applicant may not, without the Court's leave:

(a) discontinue a group member's proceeding; or

(b) accept money brought into Court in answer to a cause of action in a group member's proceeding.

(2) The Court's approval is required for the compromise or settlement, by the principal applicant, of a matter in dispute in a group member's proceeding.

(3) The matters that the Court shall take into account for the purposes of subsection (1) or (2) include:

(a) the nature and the likely cost and duration of the proceedings if approval or leave were not given;

(b) the amount offered and the likelihood of success in the proceeding;

(c) whether the discontinuance, compromise, settlement or acceptance of money is in the interests of the group member having regard to the views, if they are made known to the Court, of the group member; and

(d) whether satisfactory arrangements have been made for the distribution of money to be paid to the group members.

(4) In giving approval or leave, the Court may make such orders as are just with respect to the distribution of money paid under the settlement or paid into Court.

(5) A group member may, without leave but in accordance with the Rules:

(a) accept money brought into Court in answer to a cause of action in the group member's proceeding; or

(b) settle the group member's proceeding.

Form of judgment

29. An order or judgment in proceedings to which this Act applies must describe or identify the group members affected.

Aggregate assessment of monetary relief

30. (1) This section applies to proceedings to which this Act applies and in which the relief claimed is or includes payment of money (other than on account of costs).

(2) The Court may, in respect of 2 or more of those proceedings, order the respondent to pay an aggregate amount without specifying the amount payable in respect of each proceeding.

(3) The Court must be satisfied that the aggregate amount is a reasonably accurate assessment of the total of the money payable as relief in those proceedings.

(4) The order, so far as it relates to each of the proceedings, shall be taken to be an order made in that proceeding.

(5) The order must include provision for the distribution to the group members entitled of the money ordered to be paid, which may, among other things, cover:

(a) the constitution and administration of a fund for the payment of the money ordered to be paid;

(b) entitlements to interest earned from the money in such a fund; and

(c) payment by instalments, either to a fund so constituted or to group members.

(6) The order must also:

(a) require notice to be given to group members as specified in the order; and

(b) specify a day, not earlier than 6 months after the day on which the order is made, before which the group members are to take a step, as specified in the order, to identify themselves.

(7) The Court may, if it is just to do so, allow a group member to take the step after that day.

(8) On application by the respondent after that day, the Court shall make such orders as are just for the payment from a fund constituted as mentioned in subsection (5) to the respondent of so much of the money in the fund as will not be required to be paid to the group members.

Costs

31. (1) Subject to this Act, the Court may not order a group member to pay the costs of the respondent in the group member's proceeding (except to the extent that the group member has the conduct of the proceeding) but such an order may be made against the principal applicant.

(2) In a group member's proceeding, an order for security for costs may not be made against the principal applicant on the ground that the proceeding is for the benefit of the group member and not for the benefit of the principal applicant.

Abolition of maintenance

32. (1) Conduct, not being conduct that constitutes champerty, in relation to a principal proceeding or a group member's proceeding is not unlawful merely because it constitutes maintenance.

(2) A contract is not void, voidable or unenforceable merely because it relates to conduct referred to in subsection (1).

(3) Subsections (1) and (2) do not apply to anything done before the commencement of this Act.

Fee agreements

33. (1) The Court may, at any stage of proceedings to which this Act applies, on application, approve an agreement concerning the remuneration to be paid to a legal practitioner in relation to the proceedings.

(2) The Court shall not approve an agreement that provides for the amount of the remuneration to be ascertained by reference to the amount recovered, or ordered to be paid, in the proceedings.

(3) If the Court approves the agreement:

(a) the agreement is not void, voidable or unenforceable merely because it relates to conduct that constitutes maintenance or champerty;

(b) conduct authorised or otherwise provided for in the agreement in relation to those proceedings is not unlawful merely because it constitutes maintenance or champerty; and

(c) unless the Court, on application by a group member, otherwise orders, the amount payable under the agreement must be paid as provided for in the agreement.

[*Provisions concerning the establishment of a special fund to provide financial assistance in relation to grouped proceedings may be included at this point*]

Appeals by principal applicant or group members

34. (1) Section 7 extends to appeals from judgments of the Court in proceedings commenced as mentioned in subsection 7(1).

(2) A group member may institute an appeal from a judgment of the Court in that group member's proceeding, or as principal applicant, after the time limited for the instution of appeals, without the Court's leave, but only if the appeal is instituted within 30 days after the time limited for appeals has ended.

(3) In the application of this Act in an appeal mentioned in this section:

(a) section 18 does not apply so as to require that notice be given, but only so as to permit the Court to order that notice be given; and

(b) section 19 does not apply but a group member may discontinue without leave.

Appeals by respondent

35. (1) The respondent may appeal or cross-appeal against the principal applicant and one or more group members, or against 1 or more group members, in the same proceeding and in such an appeal:

(a) the appeal or cross-appeal must describe or otherwise identify the group members, but it is not necessary to name, or specify the number of, the group members;

(b) section 18 and the Rules shall not apply so as to require that notice be given, but only so as to permit the Court to order that notice be given; and

(c) section 19 does not apply.

(2) Section 16 applies in relation to an appeal or cross-appeal against the principal applicant and 1 or more group members.

(3) If the appeal or cross-appeal is against more than 1 group member but not against the principal applicant, the Court must, by order, appoint a group member to be principal applicant and section 16 applies accordingly.

(4) The Court may make any proper order for the application, modified as mentioned in the order, of the other provisions of this Act in such an appeal.

Appeals to the High Court

36. (1) The provisions of this Act apply to appeals to the High Court as they apply to appeals to the Full Court of the Federal Court.

(2) This section does not affect the operation of section 33 of the Federal Court Act.

Rules of Court

37. The power of the Judges of the Court, or of a majority of them, to make Rules of Court extends to making Rules of Court, not inconsistent with this Act, for or in relation to proceedings to which this Act applies.

Explanatory Memorandum to draft Federal Court (Grouped Proceedings) Bill 1988

OUTLINE

1. This Bill provides for the grouping of proceedings in the Federal Court of Australia. It implements the recommendations in a report from the Australian Law Reform Commission titled 'Grouped Proceedings in the Federal Court' published in 1988 (ALRC 46).

NOTES ON CLAUSES

Clauses 1 and 2 — Short title and commencement

2. These clauses are formal clauses providing for the citation and the commencement of the Bill. The Bill will come into operation on a day to be fixed by Proclamation.

Clause 3 — External Territories

3. Unless an Act specifically so provides, it will not have effect in Australia's external Territories (for example, Norfolk Island). *Clause 3* extends the operation of the Bill to all external Territories, including Norfolk Island. It is necessary to extend the Bill to all the external Territories because many Commonwealth laws, which could be invoked in proceedings to which the Bill applies, extend to the external Territories.

Clause 4 — Act to bind Crown

4. An Act is presumed not to bind the Crown unless there is a specific provision in the Act to that effect. *Clause 4* is such a provision, ensuring that the Crown in all its capacities is bound by the Bill when it is a litigant in proceedings to which the Bill applies.

Clause 5 — Interpretation

5. This clause defines a number of expressions used generally throughout the Bill:

- *excluded Act*: this definition limits the kinds of claims that can be used to base grouping of proceedings (see the definition of 'federal matter' below and clause 11). It covers the following Acts:
  - the Family Law Act 1975
  - the Jurisdiction of Courts (Cross-vesting) Act 1987
  - the Marriage Act 1961
  - the Norfolk Island Act 1979

- the Northern Territory (Self-Government) Act 1978
- any of the applied provisions as defined by section 3 of the Commonwealth Places (Application of Laws) Act 1970.

The Marriage Act 1961 and the Family Law Act 1975 are excluded because of their nature they would not generally found proceedings that could be grouped. The applied provisions as defined by section 3 of the Commonwealth Places (Application of Laws) Act 1970 are the provisions of laws of the States that have effect in Commonwealth places. Claims under these provisions are not able to base grouped proceedings because they are essentially State law: it is only for constitutional reasons that the laws are 'federalised'. Claims under the Jurisdiction of Courts (Cross-vesting) Act 1987 are purely jurisdictional and therefore cannot form the basis of grouped proceedings. The cross-vesting scheme will, however, apply in relation to grouped proceedings as it does to individual proceedings. Claims under the Norfolk Island Act 1979 and the Northern Territory (Self-Government) Act 1978 include all matters arising under the laws of these Territories and do not form the basis of grouped proceedings because, in accordance with current constitutional practice, these Territories are treated as States.

- *Federal Court Act*: this definition is self explanatory.
- *federal matter*: this definition is relevant to clause 11 which requires the principal proceeding to be in respect of a 'federal matter' or a 'Territory matter', and clause 8, which extends the jurisdiction of the Court to include all federal and Territory matters not otherwise within its jurisdiction. 'Federal matter' means any matter
  - arising under a law of the Commonwealth (other than an excluded Act — see definition above)
  - in which relief is sought against the Commonwealth or
  - of a kind mentioned in 75(v) of the Constitution (for a list of the matters see notes to subclause 11(2)).
- *group member*: a group member is a person whose proceeding is commenced as mentioned in subclause 7(1), or is being conducted, by a principal applicant. A person ceases to be included within the definition when the principal applicant ceases to have conduct of his or her proceeding, for example, when the group member 'opts out' and assumes the conduct of his or her own proceeding (see clause 19).
- *group member's proceeding*: a group member's proceeding is one commenced as mentioned in subclause 7(1), or which is being conducted, by the principal applicant.
- *principal applicant*: the principal applicant is the person who commences proceedings as mentioned in subclause 7(1). A principal applicant includes a person who replaces the original principal applicant or a person who has been given the conduct of 2 or more group members' proceedings.

- *principal proceeding*: a principal proceeding is the principal applicant's proceeding.
- *Rules*: this definition is self explanatory.
- *Territory matter*: by subclause 11(1), the principal proceeding must be in respect of either a federal matter or a Territory matter. Territory matter is defined as any matter within the jurisdiction of a Territory court, other than a court of the Northern Territory or Norfolk Island (these Territories have been accorded self-government). It excludes jurisdiction that such Territory courts have simply by virtue of the cross-vesting scheme.

6. *Subclause 5(2)* provides that other expressions in this Act have the meanings they have under the Federal Court Act.

Clause 6 — Operation of other laws etc.

7. The Bill creates a new procedure for commencing and conducting proceedings in the Federal Court. It does not change existing laws that apply to proceedings in the Federal Court unless those changes are provided by the Bill. *Subclause 6(1)* makes it clear that the Bill does not affect

- rights to commence and maintain proceedings
- the powers of a court in relation to a proceeding.

Special mention is made of laws relating to vexatious litigants, representative proceedings, joinder of parties and consolidation of proceedings, all of which are explicitly preserved.

8. *Subclause 6(2)* makes it clear that the Bill creates a new procedure by which existing causes of action can be conducted. It does not create a new cause of action.

Clause 7 — Commencement of grouped proceedings lawful

9. *Subclause 7(1)* makes it lawful for a person who commences a proceeding against a respondent to also commence other proceedings for group members against the same respondent by the same application. Each group member's proceeding must be within the jurisdiction of the Court as extended by clause 11.

10. *Subclause 7(2)* applies where the commencement of a group member's proceeding would constitute a breach of an agreement or a contravention of a law or of an order of a court. This is necessary because a group member's proceeding can be commenced without his or her consent (see clause 8). In such a case the group member is not to be taken to have breached the agreement or contravened the law or court order, but the respondent's rights (for example, the right to have the proceeding struck out as inconsistent with the agreement etc) are expressly preserved.

Clause 8 — Consent of, or tutor, etc, for, group members not essential

11. *Clause 8* makes it clear that it is not necessary to obtain the consent of a group member before commencing a group member's proceeding unless the group member is

- a Commonwealth or a State
- a Minister of State or a Minister of a State or Territory
- a body corporate established for public purposes by a law of the Commonwealth or of a State or Territory (not being a company) or
- an officer of the Commonwealth, or a State or Territory in his or her capacity as such an officer.

12. *Subclause 8(2)* deals with persons under a disability, that is, those who are infants or mentally disabled. Ordinarily, these people must sue by a tutor. Subclause 8(2) enables group members' proceedings to be brought for group members under a disability without their consent but requires that a tutor be appointed if the group member wishes to take a step in or conduct his or her own proceeding.

Clause 9 — Different relief may be claimed

13. *Clause 9* makes it clear that there is no need for the relief claimed in the principal applicant's and group member's proceedings to be the same nor do all group members need to claim the same relief. For example, the principal applicant may claim an injunction and damages while some group members claim an injunction only and others seek a declaration.

Clause 10 — Minimum of 7 group members needed

14. *Clause 10* ensures that the goals of efficiency are achieved by providing that, if the Court finds that there are fewer than 7 group members' proceedings, the Court must decide whether to allow the proceedings to continue or to separate the proceedings and give their conduct to each group member concerned. The order may be conditional.

Clause 11 — Jurisdictional requirements

15. *Subclause 11(1)* does two things. First, it imposes the requirement that the principal proceeding be in respect of a federal matter or a Territory matter (as defined in clause 5). Secondly, it extends the jurisdiction of the Federal Court in respect of the principal proceeding to all federal and Territory matters so defined.

16. *Subclause 11(2)* extends the jurisdiction of the Court with respect to group members' proceedings to all matters mentioned in 75 and 76 of the Constitution and all Territory matters not otherwise within the jurisdiction of the Court. The matters mentioned in s 75 and 76 of the Constitution which are not part of the present jurisdiction of the Federal Court include matters

- arising under a treaty (s 75(i))
- affecting consuls or other representatives of other countries (s 75(ii))
- in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party (s 75(iii))
- between States, or between residents of different States, or between a State and a resident of another State (s 75(iv))

- matters relating to the same subject-matter claimed under the laws of different States (s 76(iv)).

This provision, when taken with the cross-vesting scheme, gives the Federal Court comprehensive jurisdicton (subject to the exceptions outlined in subclause 11(3)).

17. *Subclause 11(3)* provides that certain specific jurisdiction is not conferred on the Federal Court by either subclause 11(1) or 11(2). The excluded jurisdiction is in respect of matters:

- under the Judiciary Act 1903 paragraphs 38(a) to (d) inclusive
- in which certain specified relief is sought against Judges of the Family Court or Commissioners of the Conciliation and Arbitration Commission.

These matters are in the exclusive jurisdiction of the High Court. The Judiciary Act 1903 section 38 provides:

> 38. Subject to section 44, the jurisdiction of the High Court shall be exclusive of the jurisdiction of the several Courts of the States in the following matters:
>
> (a) matters arising directly under any treaty;
>
> (b) suits between States, or between persons suing or being sued on behalf of different States, or between a State and a person suing or being sued on behalf of another State;
>
> (c) suits by the Commonwealth, or any person suing on behalf of the Commonwealth, against a State, or any person being sued on behalf of a State;
>
> (d) suits by a State, or any person suing on behalf of a State, against the Commonwealth or any person being sued on behalf of the Commonwealth;
>
> (e) matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court.

Clause 12 — Links between principal proceeding and group members' proceedings

18. *Clause 12* requires that there be sufficient links between the principal proceeding and each group member's proceeding to ensure that, in most cases, they can be conducted together efficiently.

19. *Subclause 12(1)* requires two kinds of link to be shown. First, there must be at least one question which is the same (or common) in the principal proceeding and in each group member's proceeding. Secondly, the material facts giving rise to each claim for relief as pleaded in the statement of claim or other originating process in respect of each group member's proceeding must be the same as, or similar or related to, the material facts giving rise to a claim for relief in the principal proceeding.

20. In each case the link to the principal proceeding must be to the 'federal or Territory matter' aspect of the principal proceeding, that is, the link must be with the principal proceeding so far as it is in respect of a federal matter or a Territory matter.

21. *Subclause 12(2)* makes it clear that the interpretation of similarly worded tests in the existing rules for joinder of proceedings is not to apply: material facts can be 'similar or related' even though they relate to different transactions or events.

Clause 13 — Form etc, of originating process

22. *Clause 13* sets out the requirements for an application or other document filed in support of an application.

23. *Paragraph 13(a)* requires that the group members be described or otherwise identified but it is not necessary to name them or specify how many there are. Consistently with the Federal Court Rules O 4 r 3(1) *paragraph 13(b)* provides that the application must specify the relief claimed in the principal proceeding and in each of the group members' proceedings.

Clause 14 — Addition of further group members: incomplete groups

24. If an application commencing grouped proceedings does not include as group members all persons with related claims, that is, if the group is not as extensive as it could be, the respondent or those excluded may be prejudiced. The purpose of *clause 14* is to allow the Court to deal with situations where persons who could have been included as group members in the originating process are omitted. A potential group member or the respondent can, under *subclause 14(3)* apply in the principal proceeding for all the proceedings to be stayed for a specified time under *subclause 14(1)* to give the principal applicant the opportunity to amend the application or to seek leave to amend the application (if leave is required at that stage in accordance with the Federal Court Rules) to commence proceedings for further group members. If the principal applicant does not avail himself or herself of that opportunity, *subclause 14(2)* allows the Court

- to replace the principal applicant with an existing or potential group member or
- to separate the proceedings so that each member has the conduct of his or her own proceeding.

25. *Paragraphs 14(2)(a) and (b)* require the Court, before it exercises these powers, to find both that

- the respondent or the potential group member would suffer prejudice or inconvenience if the application were not so amended and
- the principal applicant would be unlikely to be caused expense or inconvenience if the application were so amended.

Group members' proceedings commenced in this way will have commenced on the date of that amendment.

26. *Subclause 14(4)* allows the Court to make consequential orders, for example, orders as to notice or the effect of steps already taken by the principal applicant.

Clause 15 — Addition of further group members: causes of action accruing after commencement

27. For reasons similar to those applying to clause 14, *clause 15* allows an application to be amended to include in the description of group members people whose causes of action had not accrued when the proceedings were commenced but which accrued

before a date fixed by the Court. The object is to include as many potential group members as possible to facilitate the aims of access and judicial economy. Under *subclause 15(1)*, the principal applicant, the respondent or a group member may apply for a date to be fixed. Group members' proceedings for people whose causes of action accrued after the principal proceeding was commenced but before the date so fixed will be commenced on the date of the amendment. All the requirements for grouped proceedings set out in clauses 8 to 13 (inclusive) apply to the group members' proceedings so commenced: *subclause 15(2)*.

28. *Subclause 15(4)* allows the Court to make consequential orders, for example, orders as to notice or the effect of steps already taken by the principal applicant.

Clause 16 — Proceedings to be conducted as one proceeding

29. The object of *clause 16* is to ensure that the proceedings of the principal applicant and all group members are conducted as one proceeding so that there is no duplication in relation to pleadings, legal representation or procedural steps taken in the proceedings.

30. *Subclause 16(1)* gives the conduct of group members' proceedings to the principal applicant: the group members still remain parties to their own proceeding.

31. *Subclause 16(2)* requires the grouped proceedings to be conducted as one proceeding. Accordingly, as mentioned in *subclause 16(1)*, whatever the principal applicant does in his or her proceeding will be taken to have been done in each of the group members' proceedings. *Subclause 16(3)* makes it clear that service of a document on the principal applicant will be effective service on a group member. *Paragraph 16(2)(b)* makes it clear that the Federal Court Act and the Federal Court Rules are to be read, so far as they apply in the case of grouped proceedings, as if the grouped proceedings were a single proceeding. *Paragraph 16(4)(b)* prevents a respondent from requiring a group member to do anything personally in relation to the proceedings without the leave of the Court. These provisions are all designed to ensure that procedural steps are not duplicated.

32. However, if it is appropriate for a group member to take a step in his or her proceeding, the group member may seek leave to do so (*paragraph 16(4)(a)*) and the step has effect notwithstanding any step taken by the principal applicant (*subclauses 16(1), (5)*). The group member need not assume full conduct of his or her proceeding to take such a step. The provision preserves flexibility, subject to Court control.

Clause 17 — Powers of Court where money claimed

33. *Clause 17* allows the respondent to apply to prevent the continuation of grouped proceedings if the costs to the respondent of identifying group members and distributing to them any monetary relief would be excessive having regard to the amount of any monetary relief which would be payable.

34. *Subclause 17(1)* provides that if the amount which would be recovered by group members after deduction of these costs would be so small as to not justify the proceedings, the Court has three alternatives:

- separate the proceedings so each group member has the conduct of his or her own proceeding
- stay a group member's proceeding so far as it relates to monetary relief or
- dismiss the group member's proceeding.

35. *Subclause 17(2)* provides that such a dismissal is not a bar to the group member taking proceedings against the respondent on the same or substantially the same cause of action.

Clause 18 — Notice

36. The object of *clause 18* is to set out the rules for giving notice, in the most efficient and effective way, to group members of the commencement of their proceeding and of any other event during the course of the proceedings which may affect their rights.

37. *Subclause 18(1)* requires group members to be given notice of the commencement of their proceedings. The notice must include information about the ways in which a group member can assume the conduct of his or her proceeding (chiefly, how to 'opt out' — see clause 19). This notice must be approved by the Court and must be given as soon as practicable after the first directions hearing.

38. *Subclause 18(2)* ensures that the Court does not determine an application for approval of a settlement (see subclause 28(2)) or an application for approval of a fee agreement (see subclause 33(1)) unless notice has been given to group members. This is to ensure that the views of group members can be made known to the Court. The Court has a discretion to waive this requirement if it is just to do so, for example, if the settlement figure is so low that it would not be approved in any event or where all group members are already aware of the application through other means.

39. Similarly, *subclause 18(3)* requires notice to be given if money is brought into Court in answer to a cause of action in a group member's proceeding so that the group member's views can be taken into account in determining whether such money should be accepted. The Court's approval of acceptance is required by paragraph 28(1)(b). Again, the Court has a discretion to waive this requirement.

40. *Subclause 18(4)* requires notice to be given when an application is made by a respondent to dismiss group members' proceedings on the ground of want of prosecution. This may happen when the Court 'unbundles' the group members' proceedings under, for example, clause 17 or 20 and the group members do nothing about continuing the proceedings. This requirement is designed to protect group members' interests but will not be unduly costly for the respondent. Again, the Court has a discretion to waive this requirement.

41. *Subclause 18(5)* gives the Court a discretion to order that notice be given to group members at any other time when it is appropriate to do so. Circumstances where notice may be appropriate include where:

- the principal applicant needs to be replaced (see clause 23)

- an aggregate assessment of monetary relief has been made and each group member must come forward to claim (see clause 30)
- a further principal applicant is needed to represent a subgroup (see clause 22).

42. Whenever notice is to be given, *subclause 18(6)* requires the Court to specify who is to give the notice and the way in which notice is to be given. The Court can also direct a party to provide information relevant to the giving of notice (such as the names of group members) and can make an order as to who should bear the costs of notice.

43. *Subclause 18(7)* directs that notice be given by the most cost-effective means, and specifically allows it to be given by press advertisement or by radio or television broadcast. Because of its high cost, *subclause 18(7)* provides that personal notice need not be given unless the Court is satisfied that it is reasonably practicable, and not unduly expensive, to do so.

44. *Subclauses 18(8) and (9)* cover the case where a notice concerns a matter for which the Court's leave or approval is required, for example, a determination of an application to approve a settlement or application for leave to accept money brought into Court. The notice must specify the period of time within which a group member may apply to the Court or take some other step in relation to the matter. For example, the group member may be given a certain time to make his or her views on an application for approval of a settlement known to the Court. Under these subclauses, this sort of information must be contained in the notice.

45. *Subclause 18(10)* protects group members who have not received or responded to a notice by providing that the Court can make any proper order in relation to them – for example, the Court could give leave for a group member who had not identified himself or herself within the period prescribed under paragraph 30(6)(b) to make a claim out of time. Failure to receive or respond to notice will not, however, invalidate anything done in the grouped proceedings.

Clause 19 — Group members may 'opt out'

46. *Clause 19* allows group members to disassociate himself or herself from the grouped proceedings by assuming the conduct of his or her proceeding personally or discontinuing his or her proceeding altogether.

47. *Subclause 19(1)* allows a group member to 'opt out' by giving notice in accordance with the Rules that he or she intends to assume conduct of his or her own proceeding. The subclause thereupon confers on the group member the conduct of his or her proceeding to the exclusion of the principal applicant: the group member's proceeding becomes an ordinary proceeding in the Federal Court.

48. *Subclause 19(2)* allows the group member to discintinue his or her proceeding by the same notice, without further formality.

49. *Subclause 19(3)* allows the Court to specify a day after which a group member will not be able to 'opt out' without the Court's leave.

Clause 20 — Group members may be given conduct of proceedings

50. Grouped proceedings comprise a number of proceedings being conducted together. If it is found that the total costs of conducting them separately is less than the cost of conducting them together, *clause 20* provides for the Court to 'unbundle' the proceedings and allow them to be conducted individually by the principal applicant and each group member.

Clause 21 — Group member may be given conduct of proceedings on particular questions

51. Not every question in each group member's proceeding and the principal proceeding need be the same. Where questions arise which could be answered differently in relation to each group member, *clause 21* provides for the Court to give the conduct of the relevant group member's proceeding, so far as they each relate to those questions, to those group members if it is necessary for the question to be properly determined. Examples of such 'individual questions' include

- whether a misrepresentation induced a particular group member to enter a contract
- the quantum of damages to which each group member is entitled after determination of liability.

Clause 22 — Group member may become additional principal applicant

52. *Clause 22* allows a further principal applicant or applicants to be appointed in order to conduct some but not all group members' proceedings so far as they relate to issues common to those group members. For example, in a principal proceeding claiming damages for a breach of the Trade Practices Act 1974 (Cth) s 52, some group members may have relied on a representation made by the respondent in relation to a product while others may claim only that the product was not of merchantable quality. A further principal applicant may need to be appointed to represent those group members who do not have claims under the Trade Practices Act 1974.

Clause 23 — Group member may replace principal applicant

53. *Clause 23* provides for two situations in which a principal applicant may be replaced.

54. *Subclause 23(1)* provides for replacement where the principal applicant is not conducting group members' proceedings, or is unable to conduct them, in the interests of the group members. Group members' interests are protected by allowing them to apply to replace the principal on either of these grounds.

55. *Subclause 23(2)* provides that a principal applicant must be replaced when his or her proceeding has been concluded, for example, by settlement or discontinuance.

Clause 24 — Provisions applicable to the operation of section 19–23 (inclusive)

56. *Subclause 24(1)* gives the Court power to make any consequential order when the principal applicant ceases to have the conduct of a group member's proceeding. Such orders may include orders as to notice, amendment to the pleadings or staying proceedings.

57. *Subclause 24(2)* specifies that an application under clause 21, 22 or 23 may be made

- by a group member without leave (leave is normally required under paragraph 16(4)(a))
- by the principal applicant or
- of the Court's own motion.

It enables the Court to take an active role in the management of grouped proceedings and also ensures that group members have an opportunity to protect their interests.

Clause 25 — Legal representation

58. Except in the case of corporations, a person can at present conduct a proceeding in the Federal Court without legal representation. *Clause 25* makes it compulsory for the principal applicant to be legally represented when he or she is conducting group member's proceedings. The legal practitioner may not be a group member.

Clause 26 — Discovered documents

59. *Clause 26* overcomes an existing rule that documents or things discovered in a proceeding can be used only for the purposes of that proceeding. It specifically allows any discovered document or thing (such as a tape recording or a computer program) to be used in all the proceedings being conducted by the principal applicant, to avoid duplication of discovery.

Clause 27 — Certain claims by respondents against group members

60. Where the respondent cross claims against a group member or commences proceedings against a group member in another court, this clause allows the Federal Court to stay the enforcement of relief obtained in the group member's proceeding brought under this Bill until the cross claim or other proceeding has been determined.

61. A respondent must cross claim against named group members. There is no provision for a cross claim to be brought against unidentified group members.

Clause 28 — Discontinuance, settlement etc, of group member's proceedings

62. *Subclause 28(1)* provides that, to protect the interests of group members, the principal applicant must obtain the Court's leave before discontinuing a group member's proceeding or accepting money brought into Court in answer to a cause of action

in a group member's proceeding. For the same reason, *subclause 28(2)* requires that any settlement by the principal applicant of a group member's claim must be approved by the Court.

63. *Subclause 28(3)* lists matters the Court should take into account in determining whether the leave or approval should be given.

64. *Subclause 28(4)* allows the Court, in giving leave or approval, to make orders to ensure that adequate arrangements are made for the distribution of money to be paid to group members.

65. *Subclause 28(5)* abrogates the rule (see paragraph 16(4)(a)) that a group member cannot take a step in his or her proceeding without first obtaining the Court's leave by allowing a group member to accept money brought into Court or to settle that proceeding without the Court's leave.

Clause 29 — Form of judgment

66. *Clause 29* requires the Court, when giving judgment, to describe or identify the group members affected. It is not necessary for the Court to name the group members.

Clause 30 — Aggregate assessment of monetary relief

67. *Clauses 30* applies to grouped proceedings where monetary relief (except for costs alone) is claimed. It allows the Court to make a global award covering all the group members described or identified in the award, rather than making individual awards of monetary relief in each group member's proceeding.

68. *Subclauses 30(1) and (2)* allow the Court to make such a global award. Under subclause 30(3), the Court must be satisfied that the aggregate amount is a reasonably accurate assessment of the total of the money payable as relief in the group members' proceedings covered by the award.

69. *Subclause 30(4)* deems an aggregate award to be an order made in each group member's proceeding to the extent that it relates to that proceeding. This is necessary to ensure that the order operates as an order in each proceeding to which it is to apply.

70. *Subclause 30(5)* directs the Court to make provision for the distribution of any aggregate award of money to the group members. In providing for this distribution, the Court may need to make provision for the constitution and administration of a fund out of which claims can be paid, for entitlements to interest earned from the money in such a fund and for payment by instalments either to the fund or to group members.

71. *Subclause 30(6)* requires notice to be given to group members of an aggregate assessment and also requires the Court to specify a day, at least six months after the day on which the aggregate assessment is made, before which the group members must take any step specified in the order to identify themselves. This clause is intended to enable group members to register their interest in the proceedings but does not mean that group members have to prove their claim by that date. Subclause 18(10) allows the Court to make appropriate orders if a particular group member did not receive notice.

72. *Subclause 30(8)* allows the respondent to apply to the Court for the return of so much of the aggregate award as will not be required to be paid to group members. The purpose of this subclause is to ensure that respondents are not penalised by the making of an aggregate assessment of damages in the ordinary case and that compensation is paid only to persons directly entitled to it.

Clause 31 — Costs

73. *Subclause 31(1)* relieves group members from any liability to pay the costs of another party and imposes that liability on the principal applicant. The ordinary liability for costs will apply, however, to the extent that a group member is conducting his or her own proceeding.

74. *Subclause 31(2)* prevents the operation of the rule that security for costs may be ordered if a person is conducting proceedings not for his or her own benefit but for the benefit of another person. It ensures that an order for security for costs cannot be made on that ground alone.

Clause 32 — Abolition of maintenance

75. Maintenance is the making of contributions to support (maintain) litigation. At common law it is an actionable wrong and is also a crime. So far as proceedings in courts exercising federal jurisdiction, and in Territory courts, are concerned, *subclause 32(1)* abolishes the doctrine of maintenance. The rule that renders unlawful champerty (that is, assisting a person to bring legal proceedings on an agreement to share in the proceeds) is not affected by this clause (but champertous agreements are permitted in limited circumstances under clause 33).

76. *Subclause 32(2)* overcomes the rule that contracts for maintenace are illegal.

77. *Subclause 32(3)* provides that the protection afforded by this clause is prospective only: it does not affect acts done before the commencement of the Bill.

Clause 33 — Fee agreements

78. Under the present law, a litigant cannot agree with his or her solicitor that higher than normal fees will be paid if the case is successful and that no fee will be payable if the case is lost. *Subclause 33(1)* allows the Court to approve such an agreement.

79. Under *subclause 33(2)*, the Court cannot approve an agreement if the amount of fees to be paid is to be calculated by reference to the amount recovered or ordered to be paid in the proceedings. In other words, percentage contingency fee agreements cannot be approved by the Court.

80. *Subclause 33(3)* provides that an approved fee agreement is not unlawful because, under the present law, it would constitute maintenance or champerty. Provision is made by *paragraph 33(3)(c)* for a group member to apply for the fee agreement to be varied; otherwise the fee must be paid as provided for in the agreement.

Clause 34 — Appeals by principal applicant or group members

81. *Subclause 34(1)* makes it clear that appeals from judgments in proceedings conducted as grouped proceedings can be brought as grouped proceedings.

82. *Subclause 34(2)* allows an extension of the 30 day period allowed for appeals in cases where the principal applicant has not appealed in that time. This is designed to allow a group member who had been relying on the principal applicant to appeal to lodge an appeal without penalty.

83. *Subclause 34(3)* modifies the provisions as to notice in relation to appeals by providing that notice be discretionary in all cases. In addition a group member cannot 'opt out' of an appeal brought as grouped proceedings in order to conduct his or her own appeal against the respondent, although he or she can discontinue the appeal without leave.

Clause 35 — Appeals by respondent

84. *Subclause 35(1)* allows a respondent to appeal against one or more group members without having to name them. By *subclause 35(2)*, the appeals are to be conducted as one proceeding (that is, clause 16 applies). Although no provision is made for defendant class actions in the Bill, the respondent may, under this subclause, appeal against a judgment in grouped proceedings in relation to all the group members affected. As with appeals by the principal applicant or group members brought as grouped proceedings, notice is discretionary only. *Paragraph 35(1)(c)* prevents a group member from opting out of an appeal in which he or she is the respondent.

85. *Subclause 35(3)* requires the Court to appoint a group member as a new principal applicant if the appeal is not against the principal applicant in the original grouped proceedings.

86. *Subclause 35(4)* allows the Court to give directions modifying the application of the other provisions of the Bill in the case of grouped appeals by the respondent.

Clause 36 — Appeals to the High Court

87. *Subclause 36(1)* allows appeals to the High Court to be brought as grouped proceedings. The restrictions on appeals to the High Court from decisions of the Federal Court (specifically, the requirement that special leave be obtained), are preserved by *subclause 36(2)*.

Clause 37 — Rules of Court

88. *Clause 37* extends the power of the Judges of the Federal Court to make Rules of Court to cover proceedings brought as grouped proceedings.